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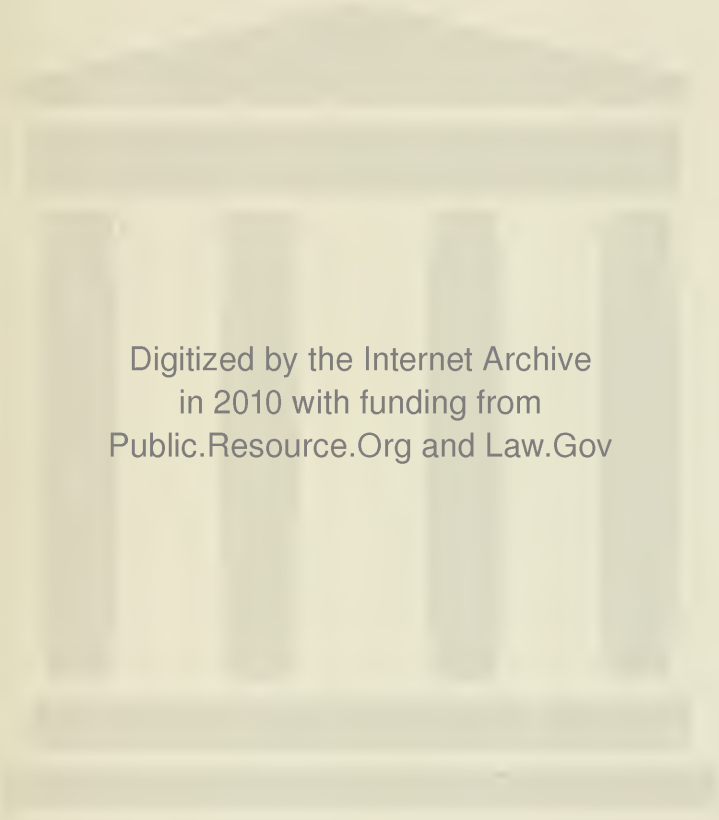

No. 5874

1040 United States 1634

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES)

CHARLES A. BURCKHARDT,

Appellant,

vs.

THE NORTHWESTERN NATIONAL BANK, a National Banking Association, CHARLES K. SPAULDING, PHIL METSCHAN, A. D. CHARLTON, E. S. COLLINS, CHAUNCEY McCORMICK, NATT McDOUGALL, FREDERICK F. PITTOCK, MARK SKINNER, CHARLES H. STEWART, O. L. PRICE, EMERY OLMSTEAD, JAMES F. TWOHY and CHARLES A. MORDEN,

Appellees,

and

FRED A. BALLIN,

Appellant,

vs.

THE NORTHWESTERN NATIONAL BANK, a National Banking Association, CHARLES K. SPAULDING, PHIL METSCHAN, A. D. CHARLTON, E. S. COLLINS, CHAUNCEY McCORMICK, NATT McDOUGALL, FREDERICK F. PITTOCK, MARK SKINNER, CHARLES H. STEWART, O. L. PRICE, EMERY OLMSTEAD, JAMES F. TWOHY and CHARLES A. MORDEN,

Appellees.

VOLUME I.
(Pages 1 to 384, Inclusive.)

Upon Appeals from the United States District Court for the District of Oregon.

Filmer Bros. Co Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD.

Mr. WILLIAM C. BRISTOL, Wilcox Building, Portland, Oregon, for Appellants Charles A. Burkhardt and Fred A. Ballin.

CAREY & KERR and CHARLES A. HART, Yeon Building, Portland, Oregon, for Appellees Northwestern National Bank, A. D. Charlton, E. S. Collins, Natt McDougall, Frederick F. Pittock, Mark Skinner, Charles H. Stewart, O. L. Price, and James F. Twohy, and for Chauncey McCormick, Mr. M. A. ZOLLINGER, Selling Building, Portland, Oregon, for Appellee, E. S. Collins, WINTER and MAGUIRE, Pacific Bldg., for Appellee Charles K. Spaulding, DEY, HAMPSON and NELSON and ALFRED A. HAMPSON, Pacific Building, Portland, Oregon, for Appellee Phil Metschan, Mr. D. P. PRICE, American Bank Building, Portland, Oregon, and Mr. JOHN F. LOGAN, Mohawk Building, Portland, Oregon, for Appellee Charles A. Morden, SHEPPARD, PHILLIPS and RALSTON and CHESTER A. SHEPPARD, Public Service Building, Portland, Oregon, for Emery Olmstead.

In the District Court of the United States for the District of Oregon.

November Term, 1927.

BE IT REMEMBERED, That on the 7th day of November, 1927, there was duly filed in the District Court of the United States for the District of Oregon, a bill of complaint in words and figures as follows, to wit: [*3]

In the District Court of the United States in and for the District of Oregon.

IN EQUITY—No. E.–8936.

CHARLES A. BURCKHARDT,
Complainant,

vs.

THE NORTHWESTERN NATIONAL BANK, CHARLES K. SPAULDING, PHIL METSCHAN, A. D. CHARLTON, E. S. COLLINS, CHAUNCEY McCORMICK, NATT McDOUGALL, FREDERICK F. PITTOCK, MARK SKINNER, CHARLES H. STEWART, O. L. PRICE, EMERY OLMSTEAD, JAMES F. TWOHY and CHARLES A. MORDEN,
Respondents.

*Page-number appearing at the foot of page of original certified Transcript of Record.

COMPLAINT.

(Filed Nov. 7th, 1927.)

To the Honorable Judges of the Above-entitled Court, in Equity Sitting:

The complaint of Charles A. Burckhardt, a resident of the city of Seattle in the State of Washington and a citizen of said State of Washington, exhibited against the above-named respondents, all save Chauncey McCormick being residents and citizens of the State of Oregon and the said Chauncey McCormick a resident of the State of Illinois, doth for cause of suit against the above-named respondents respectfully set forth and show:

Par. 1. That Charles A. Burckhardt, above-named complainant and a resident and citizen of the State and District of Washington in the city of Seattle aforesaid, [4] is a citizen and resident of a different state than any of the above-named respondents and that there is a diversity of citizenship existing between the complainant and all of the respondents.

That Chauncey McCormick is a resident and citizen of the State of Illinois.

That The Northwestern National Bank is an association under the laws of the United States for carrying on the business of banking under and pursuant to Revised Statutes, Section 5133 and all related sections, defined and designated as Title 12 in United States Code Annotated, as enacted by Congress June 28th and approved June 30, 1926, and as existing in force December 7, 1925, and prior

thereto, with acts amendatory and supplemental thereto and under and pursuant to the laws of the United States in that behalf by Congress ordained and enacted, and during all the times herein mentioned was doing business in the city of Portland and State and District of Oregon and within the jurisdiction of this Honorable Court.

That the respondents O. L. Price, A. D. Charlton, E. S. Collins, Natt McDougall, Phil Metschan, Frederick F. Pittock, Mark Skinner, Charles K. Spaulding, Charles H. Stewart and James F. Twohy were and are the directors of aforesaid The Northwestern National Bank and still are and remain the directors, and all of them are and each of them is a resident and citizen of the State of Oregon.

That Charles A. Morden was some time a director of said Bank and is, together with O. L. Price, trustee of the H. L. Pittock estate, and for part of the time herein mentioned was sometime a director of said Bank, and also is or lately was the president, [5] treasurer and manager of Oregonian Publishing Company, a composite part of said H. L. Pittock estate, together with O. L. Price as his co-trustee, and a resident and citizen of the State of Oregon.

That Emery Olmstead was and continued to be after the first of the year 1927 president and director of said Bank, but on or about the 28th day of February, 1927, resigned as president and director thereof and the said O. L. Price succeeded him as president of said Bank, having theretofore been

and for some time past lately was chairman of the board of directors of said Bank.

Par. 2. That the amount involved in this suit exceeds the sum of three thousand dollars ($3,000.-00), exclusive of interest and costs.

Par. 3. That the banking laws of the United States, to wit, Section 5147 of the Revised Statutes as amended by the Act of February 20, 1925, Chapter 274, 43 Statutes 955, and now set forth as Section 73 of Title 12 of United States Code Annotated, and Section 93 of said Title 12 of said code derived from the Act of June 3, 1864, and incorporated in the Revised Statutes as Section 5239, are part of and involved with the subject matter of this suit.

Par. 4. That this suit is instituted, commenced and prosecuted by the complainant Charles A. Burckhardt as a stockholder of The Northwestern National Bank upon [6] behalf of himself and all other stockholders of said Bank for that said Bank and its present directors as aforesaid are the persons by and through whom the matters complained about occurred, were occasioned and were committed and for injuries to said Bank and to its said stockholders by the acts of themselves, the aforesaid directors, no one or any of them, nor said Bank, will sue or cause to be sued nor bring to account any one of themselves as between themselves and said Bank or for and on behalf of any stockholder the matters and things complained of herein, although before the filing of this complaint demand was made that they should correct and right the wrongs herein suffered and that said Bank should

proceed to enforce the duties and liabilities of said directors herein complained about.

That this complainant was and is a holder of capital stock or of shares of The Northwestern National Bank during the time of the transactions herein complained of and from and after the date of the issuance of the certificate of stock the matters and things complained of occurred down to and inclusive of the present time, and that this suit is not a collusive one to confer in a court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

That this complainant does not have any influence or voice with other shareholders or directors nor is he in any manner identified with said directors, but all of the said above-named respondents and said Bank are and were opposed during all the times herein mentioned to the conduct of the business of said Bank in a way and manner that would and could have obviated the filing of this suit and would and could have protected [7] the rights of the minority shareholders and protected the property and assets of said Bank, but upon the contrary the majority of the stock held by said above-named respondents, directors is wholly adverse to the minority and to this complainant and bent upon carrying out at all hazards the matters and things herein complained about through absolute control, through stock ownership by them, the said respondents, as directors, so that they would and did not respect any demand or request of this complainant and each and every one of said respondents are and

were antagonistic to the bringing of any suit and that as stockholders their interests were in every way and are antagonistic to the interests of this complainant, whereby and wherein they attempt to affirm the matters and things done and transacted by them herein complained about, and moreover said respondents and all of them, together with said Bank, although having abdicated control and possession of all assets and gone into liquidation as to all matters, save and except such parts of them as related to the interests of stockholders only and the carrying out of such matters as said directors themselves wished to affirm, the aforesaid respondents are thus using their position to the injury of this complainant, to the injury of said Bank and to the injury of minority stockholders as herein complained about.

Par. 5. That O. L. Price as trustee of the H. L. Pittock estate and Charles A. Morden as cotrustee of the H. L. Pittock estate, and the said O. L. Price always director and sometime chairman of the board and lately during the [8] year 1927 president of said Bank and the said Charles A. Morden himself at the time a director and a member of the board of said Bank, are possessed and hold as trustees of said H. L. Pittock estate seventy-six hundred and ninety-six (7696) shares of the capital stock of said Bank, in so far as this complainant can obtain any information and if it is otherwise or more, this complainant craves that the records be shown thereabout, and that in addition thereto O. L. Price personally holds and has two hundred and ninety (290)

shares, and that Frederick F. Pittock has and holds one hundred (100) shares, and that Charles A. Morden individually had or held fifty (50) shares, but whether he holds them now this complainant does not fully know, but this complainant says that there are approximately eighty-two hundred and eighty-six (8286) shares identified with the trustees of the H. L. Pittock estate and under their domination and control, and if not now there lately was during the time of the matters and things herein complained of and just before the institution of this suit such relationship of and between themselves and with the other respondents above named that with said eighty-two hundred and eighty-six (8286) shares or thereabouts, coupled with some fifty (50) shares held in the name of Edgar B. Piper, identified with the Oregonian Publishing Company, there is somewhere and about not less than eighty-three hundred and thirty-six (8336) shares under their control alone, and this control and ownership of shares of capital stock of said Bank, taken together with the amounts of shares held and owned and standing in the name of other respondents, to wit, Charlton, Collins, McCormick, or Miami Corporation, whichever it is, controlled by McCormick, McDougall, Olmstead, [9] Metschan, Spaulding, Stewart and Twohy, so far as this complainant can ascertain and become aware, comprehends an additional thirty-seven hundred and fifty-one (3751) shares, or more, giving to said respondents, directors, the entire and absolute control of said capital stock and any stockholders' meeting, howsoever

called, will be controlled and dominated by their said stock and with their allied and confederated interests to the exclusion of any right expressed or to be expressed by this complainant or any other minority stockholder; and this has been the fact during all the times herein mentioned and still exists as the fact.

Par. 6. That on or about the 25th day of June, 1918, the complainant was solicited to be and become by the directors of said Bank a stockholder and complainant was persuaded to purchase and take two hundred and fifty (250) shares of the capital stock of said The Northwestern National Bank at a represented reasonable market value of one hundred and twenty-five dollars ($125.00) per share and this complainant paid to said Bank on said date thirty-one thousand two hundred and fifty dollars ($31,250.00) and received certificate No. 98 for said two hundred and fifty (250) shares and has ever since and does now hold and own the same;

That at the time complainant became such stockholder the said directors at and during the times of their solicitation in said year 1918 for this complainant to become a stockholder informed and stated to complainant and represented to him that the condition of said Bank with H. L. Pittock then living as president [10] and with the Pittock fortune and the influence and prestige of his position and identification in the community, as well as the support of the Oregonian and the Oregonian Publishing Company, gave and made for said Bank an unequalled foundation and support in the community

and that its financial condition was good and prosperous.

Par. 7. That all of the directors, respondents above named, qualified and took the oath prescribed by law aforesaid before entering upon their respective duties and responsibilities of their office and promised and agreed with this complainant and all other stockholders and with said Bank, so far as the duty involved upon them or each of them, diligently and honestly to administer and each of them would diligently and honestly administer the affairs of the said The Northwestern National Bank, and that no one of them would and that they would not knowingly violate or willingly permit to be violated any of the provisions of the National Bank Act aforesaid.

Par. 8. That from the time of the organization of said Bank down to and inclusive of the 29th day of March, 1927, the interest of H. L. Pittock in his lifetime and those identified with him and the trustees of the H. L. Pittock estate, to wit, Price and Morden, and those identified with them of the above-named directors, respondents as hereinbefore set forth, were and continued to be the dominant and controlling factor in said Bank and in and about the conduct of its said business [11] and in the selection and maintenance of the directors of said Bank.

Par. 9. That said Bank commenced business January 2, 1913, with a capital of $500,000.00 and a surplus of $100,000.00 and continued with that apparent capital and surplus until on or about the

—— day of —— 19——, when its capital stock was increased to $1,000,000.00 and its surplus to $200,000.00; and with that apparent capital and surplus it continued down to and inclusive of the 2d day of July, 1922, when it again increased its capital for the third time to $2,000,000.00 with $400,000.00 surplus, and continued with this apparent capital and surplus to and until the 30th day of March, 1927; but out of this last increase was taken upwards of three hundred to three hundred and fifty thousand dollars contributed at the rate of $150.00 per share to be and was charged against and to reduce uncollectible items then due said Bank with the knowledge, permission and by the act of said respondent directors.

Par. 10. That some time between July 2, 1922, and December 31, 1926, said respondent directors of said Bank knowingly and willingly and with full and complete knowledge and information in respect of each specifically enumerated transaction set forth in this paragraph, so far as complainant can now set forth the same, the facts thereabout being all in possession of said respondents, caused, required and directed to be lost to said Bank in the said transactions:

Item 1. Dufur Orchards Co., in the vicinity
[12] of Dufar, Oregon, ...$400,000.00
Item 2. A. O. Andersen & Co..... 185,000.00
Item 3. A. Rupert & Co..... 200,000.00
Item 4. Bankers Discount Corporation 150,000.00
Item 5. Phez Corporation 125,000.00

Item 6.	Rock Creek Ranch, sometimes known as the Creath and Burke transactions coupled with Portland Wool Warehouse...	75,000.00
Item 7.	C. J. Smith, S. F. Wilson and M. L. Jones, Olex...	150,000.00
Item 8.	Davin Michellvi Sheep Co.,	200,000.00
Item 9.	G. E. Miller & Co.....	40,000.00
Item 10.	D. M. Stuart, Timber Dealer	50,000.00
Item 11.	Sam Nemiro, Clothier.....	30,000.00
Item 12.	J. E. Wheeler.....	250,000.00
Item 13.	McCormick Lumber Co.....	150,000.00
Item 14.	Wheeler Timber Co.....	90,000.00
Item 15.	W. E. Wheeler Estate....	95,000.00
Item 16.	Telegram Publishing Company	125,000.00

and this complainant cannot say and does not know how much more because the facts are in the possession of the respondents, but charges and says that the records of said Bank will show substantially as in this paragraph set forth, and that with the knowledge and information and notice to each of the directors thereabout, coupled with the fact that in the fall of 1925 or thereabouts and since said time, as well perhaps as prior thereto, the Examiner of National Banks in and of the City of Portland, the name of whom is to this complainant unknown, required all of the Wheeler lines to be reduced upon the ground that there was too much loaned by said Bank to one person and said directors there and then with knowledge of that fact agreed that the

lines should be reduced, but nevertheless willfully and knowingly violated [13] the requirements of the Examiner, the requirements of the law and did willfully and knowingly cause to be misapplied and lost to said Bank thereby all of its current and proper assets so that it was forced into liquidation on or about the 30th of March, 1927, by said directors.

Par. 11. That part of the transactions set forth in paragraph 10 hereof and indeed the Wheeler transactions were of record when Charles A. Morden, at the suggestion of O. L. Price, came to be put upon the board of said Bank and was elected a director of said Bank and at that time O. L. Price was chairman of the board and he, Price, then put Morden on the examining committee together with Metschan and Charlton, fellow directors, and they, Metschan, Charlton and Morden, ascertained and knew of the condition of said Bank and of said transactions and reported the same to the board and to their fellow directors and all of the directors, respondents, knew sufficient to put an ordinary and prudent business man upon inquiry as to the actual status and relations of the affairs of said Bank, but said directors wilfully and knowingly failed and neglected to do or cause to be done any of those things which ordinary prudent and careful men similarly situated in business transactions would do to save and prevent losses and wrong administration of bank and financial affairs, and upon ascertaining the status of said Bank and without informing the stockholders and shareholders

situated like this complainant, but suppressing and keeping to themselves and among their fellow directors hereinabove named the said disclosed facts, Morden demanded to be released as [14] a director and resigned as such and that his stock, to wit, fifty (50) shares, be purchased for the sum of sixty-two hundred and fifty dollars ($6,250.00) or thereabouts so far as this complainant can allege the fact to be on information and belief, and believing it to be creditable information does say on such belief that the said Morden was succeeded on said examining committee of said board of directors for said Bank by Charles K. Spaulding, one of the directors, and thereafter Phil Metschan, Charles K. Spaulding and A. D. Charlton, the last of whom had been a director since the organization of said Bank, constituted said Examining Committee for said board of directors, and they down to and including the time when Morden left and resigned to the year 1927 made examinations and reports of affairs of the Bank and reported to the board of directors and advised and informed their fellow directors of, in and about all of the same, and did make one report to said directors which was a confidential or private or secret report, original of which was given to Mark Skinner, vice-president, and copies to other officers and directors and kept in the files of said Bank, whereas another and different report was made to the District Bank Examiner and likewise to the Comptroller of the Currency of the United States in such way and manner that the private report would show the real and

true condition of said Bank, while the report to the District Bank Examiner and Comptroller of the Currency would show a favorable, but incorrect, condition of said Bank, and that if said reports were produced in this court this complainant charges they will show as herein alleged, and that these directors hereinbefore named did during the year 1926, did during the year 1925, and did during [15] the year 1927, and for aught this complainant knows many times prior thereto, suppress and conceal and knowingly prevent share and stockholders, like this complainant and others not on the board of directors likewise stockholders, and officials of the United States Government in that behalf given the privilege of law so as to know, the real and actual condition of said Bank and its affairs.

Par. 12. That in addition to said Examining Committee there was an executive committee of seven (7) directors and so far as this complainant can inform the Court there were meetings of the whole board in each month and when the whole board met they approved the actions of the executive committee and also of the Examining Committee, and said whole board consisted of the respondents named individually in the caption of this complaint, and the Examining Committee reported to the board every six months, and the executive committee during these periods consisted of O. L. Price, chairman and chairman of the board, A. D. Charlton, Charles K. Spaulding, Phil Metschan, Frederick F. Pittock, Mark Skinner and maybe some

others, but at least those, and the complainant alleges that it should and probably did include Emery Olmstead as one of the members of said executive committee, and in addition to the information conveyed to said board of directors of said Bank by its said committees there was an Examiner's report made on or about the 26th day of November, 1926, directing that all slow and doubtful paper be taken up and retired and a segregation of undesirable assets amounting approximately to one million five hundred thousand dollars [16] ($1,500,000.00) or thereabouts, with items directed to come out of some seven hundred and fifty thousand dollars ($750,000.00), with reductions required in uncollectible credits of some five hundred thousand dollars ($500,000.00), and that there should be immediately retired some two hundred and fifty thousand dollars ($250,000.00) of slow and doubtful paper, and so far as this complainant can say and allege each and every one of said respondents individually named in the caption hereof as directors of said Bank at said time knew and were familiar with the aforesaid condition of said Bank and that their acts and doings over and during the period from the time of the increase of the capital stock to $2,000.00 down to and inclusive of March 30, 1927, caused the liquidation of said Bank and it to go out of business with consequent loss, damage and liability to its stock and shareholders as herein shall more fully appear.

Par. 13. That during all this time and between said periods aforesaid said directors suppressed and

concealed from this complainant and other share and stockholders of said Bank other than themselves, the said directors, in the interest of whom they were allied as aforesaid, all facts and circumstances connected with their transactions and with said Bank and gave no information, knowledge or notice to said share or stockholders whereby they might or could have protected themselves and their credit in and about transactions with said Bank, and such stockholders' meetings as were had were always controlled and antagonistically manipulated by those who were as hereinbefore alleged in possession of the majority and nearly [17] two-thirds of the stock and with the assistance of their friends practically all of the stock except for a few minority stockholders like this complainant and therewith in entire control of said Bank.

Par. 14. That in the year 1923 and notwithstanding that at that time J. E. Wheeler, Wheeler Estate, Wheeler Timber Company, Telegram Publishing Company and other allied Wheeler interests were, as far as this complainant can ascertain, indebted to this Bank in the sum of approximately six hundred thousand dollars ($600,000.00), and the said board of directors of said Bank, the respondents above named, and those acting with them at that time, permitted and allowed, when they wilfully and knowingly knew and had ascertained that said Bank was then under consideration of being sold and disposed of by O. L. Price, L. B. Menefee, R. V. Jones and Guy M. Standifer, through stock control, to The United States National Bank, herein-

after mentioned, in the city of Portland, Oregon, unless as they, the said board, permitted and caused and allowed to come about said J. E. Wheeler, then so indebted to said Bank, should purchase or arrange credit to purchase from the said Guy M. Standifer, L. B. Menefee and R. V. Jones forty-two hundred (4200) shares of the capital stock of said Bank at one hundred and fifty dollars ($150.-00) the share or a total of six hundred and thirty thousand dollars ($630,000.00), and so far as this complainant knows or can ascertain and so inform the Court, this complainant causes your Honor to know and be advised and informed that said O. L. Price and his fellow directors connived, permitted, allowed and acknowledged the purchase and the arrangement of the credit [18] for purchase by said J. E. Wheeler of all of said shares at said price of one hundred and fifty dollars ($150.00) per share, to wit, the said forty-two hundred (4200) shares, and ever since said time and now, so far as this complainant knows, the said J. E. Wheeler has been carrying said shares as share and stock-holder of said Bank and some forty-seven hundred (4700) shares thereof stand as shareholder in his name, and if the records of said Bank are produced and shown herein it will be and appear that the transfers of said stock from said Menefee and from said Jones and from said Standifer were so made and have so remained from the time of such transfer to the present time to the knowledge, notice and information of all of said directors of said Bank, and this complainant doth thereabout charge

and allege the fact to be that said directors permitted the sale and transfer of said shares at one hundred and fifty dollars ($150.00) a share without regard to the interest of any other stockholder or shareholder as to that time, and without regard to the interests of this complainant, notwithstanding the matters and things set forth in paragraph 9 hereof; and that each of these things happened, occasioned and were done to the impairment of the Bank's condition and the destruction of its capital stock values by and with the knowledge, action, direction and consent of said above-named directors, respondents herein, as hereinafter alleged.

Par. 15. That during the years 1925 and 1926 and in the course and practice of said Bank there was kept a daily position or statement-book showing each day's previous business wherein "ITEMS IN TRANSIT" were treated as cash [19] and were included in reserve calculation as against deposits and each and every one of the directors named herein, to wit, Charles K. Spaulding, Phil Metschan, A. D. Charlton, E. S. Collins, Chauncey McCormic, Natt McDougall, Frederick F. Pittock, Mark Skinner, Charles H. Stewart, O. L. Price, Emery Olmstead, James F. Twohy and Charles A. Morden, saw, knew what was in said Bank, read it and understood what it meant and discussed the amount of the same and were informed by the Bank Examiners and by the Comptroller of the Currency, and particularly was O. L. Price, Charles H. Stewart and Phil Metschan, who went to see the Comptroller in the city of Washington, D. C., ad-

vised and informed and thereby knew how large the sums had been that had been charged off and how stupendous were the transactions representing the impairment of the Bank's assets and capital and that the Comptroller advised and required that a million dollars in cash be supplied and be taken out of as, of and upon a plan through a holding company or by the use of what is known as a liquidating organization in connection with said Bank so that the cash might be supplied for the slow and doubtful items caused by the management of said directors and said Bank put upon a current condition and that if this were done and the necessary money contributed the said board of directors would be authorized to pay dividends in the spring of 1927, and thereupon said directors of said Bank set about a proposal to raise seven hundred and fifty thousand dollars ($750,000.00) by each stockholder putting up thirty-seven and 50/100 dollars ($37.50) based upon said twenty thousand (20,000) shares, and seven hundred and fifty thousand dollars ($750,000.00) to be bonded and retired [20] making possible the reconstruction suggested by the Comptroller, but said directors knowingly, willfully and intentionally failed and refused to comply with the directions on request of said Comptroller in that behalf, and nevertheless continued to accommodate the said J. E. Wheeler based upon his endorsements with loans passed on by said directors arising and during and continuing through the fall of the year 1926 and into the year 1927 in violation of the National Banking Act wherein it is provided

that the total of such liabilities shall in no event exceed thirty per cent of the capital stock of the association, which would have been not more than six hundred thousand dollars ($600,000.00), to increase and multiply to the sum of six hundred and thirty-four thousand dollars ($634,000.00) or more, so far as your complainant is informed and believes, including the Telegram Publishing Company for some $120,000.00, J. E. Wheeler individually for some $234,000.00, Wheeler Timber Company for some $95,000.00, W. E. Wheeler estate for another $95,000.00 and W. M. Wheeler, by way of acceptances, in the sum of $90,000.00 or over, all, it is true, guaranteed by the said Wheeler, but composing and comprising more than thirty per cent of the capital stock of the association at that time, and if there was included in the liability of either company or firm the liabilities of the several members thereof it will upon accounting and production of records of said Bank and of said directors be and appear that the same exceeded at all times the amounts allowed by law to the knowledge of said directors and with the willful intent and knowledge of said directors to impair, and they did impair, the assets of said Bank. [21]

Par. 16. That on the turn of the year 1927, these aforesaid directors, respondents above named, and in the matters and things hereinbefore alleged continuing and still continuing to do and transact the business of said Bank in said manner, allowed and permitted the said Bank under their control and direction to get into the financial difficulties so

that it could not pay its depositors and exposed its stockholders and shareholders to be and become liable over, including this complainant, to assessed liabilities or to liabilities to undertaking banks, to wit, The United States National Bank and the First National Bank, both of the city of Portland, by some time or in some manner to this complainant unknown, and about February, 1927, leaving the management and direction and the affairs of said Bank entirely in the charge and management of O. L. Price, having on or about the last of February or the first of March, 1927, elected him president, and notwithstanding that at or about that time or in the month of February all of said directors had before them plans and proposals upon which had they acted they could have saved said Bank and its assets and prevented its liquidation in this, to wit:

First. That a plan was formulated whereby all stockholders not consenting could have been paid and retired and more than two-thirds were willing, capable and ready and had signed up and executed the plan so to do, that is to say, change said Bank into State Bank and Trust Company with a capital stock sufficient to preserve all of its assets, retire all of its unbankable or disallowed items, and said O. L. Price [22] and those acting with him agreed to said plan, executed the preliminary paper therefor and for the organization of said Bank in said manner and said directors agreeing thereto and the necessary amount of stock and money was fully subscribed and complete, and yet the said

Price and the said directors acting under his dominance and control refused to carry out and accomplish the said plan and disregarded it entirely and failed and neglected to observe the suggestions of the Comptroller and Bank Examiner as to the necessities of the situation by so refusing,—

Second. That at or about this time the Telegram Publishing Company and some of the Wheeler institutions became involved in legal proceedings or were threatened therewith and it was brought about that J. E. Wheeler for the further security and protection of said Bank was prevailed upon to turn over and entirely divest himself of, for the full protection of the stockholders of said Bank and its depositors and this complainant, all of his properties, including said Telegram and his interests in California, Oregon and elsewhere, to the full payment and satisfaction first of all of his indebtedness and obligations to said Bank, but said directors, particularly Metschan, Collins and Price, refused to consider or permit the paper known as the Telegram, published by the Telegram Publishing Company, to be sold or disposed of and refused to consider or consent to the transfer by Wheeler of assets and property sufficient to cover the whole transactions of the said Wheeler and his companies with said Bank and entirely disregard their aforesaid duties as herein alleged to said Bank as said directors under [23] their said several oaths and sat by and did nothing, so far as this complainant is informed and believes and therefore he alleges the fact to be, until the Telegram Publishing Company virtually

went into bankruptcy or was thereabout so to do and Wheeler involved by the rejection of said directors and their said negligent act and doings in refusing and failing as they then could have done to take over all of the assets of said Wheeler, including said paper, and save loss to said Bank,

And so it was that on or about the 2d day of March, 1927, the officers and directors of The Northwestern National Bank caused to be published on the first page of the Morning Oregonian and given out a statement as follows:

> "The Northwestern National Bank announces that the Pittock estate has acquired a larger measure of interest and control in the bank corporation. Associated with the Pittock estate in ownership and operation of the bank are Messrs. E. S. Collins, A. D. Charlton, Chauncey McCormick, Natt McDougall, Phil Metschan, Frederick F. Pittock, O. L. Price, Mark Skinner, Charles K. Spaulding, Charles H. Stewart and James F. Twohy, directors, all well known in Portland and the northwest as men of affairs.
>
> O. L. Price has been elected president of the bank and will have active charge of its business. It will continue to serve the public as a financial institution of first importance and known responsibility."

pursuant to which the said named persons, who are the same identical named persons herein named as respondents and as directors of said bank, left the said Price as president of said bank and director

in virtual and sole management and charge thereof and he, the said Price, with the connivance, consent and willingness of said [24] board of directors to abdicate its responsibilities and duties thereabout caused to be made an agreement with the Portland Clearing House and through it with The United States National Bank and the First National Bank, both of Portland, Oregon, wherein and whereby all matters and things pertaining to the banking business and the conduct of it in the city of Portland by The Northwestern National Bank, without the consent at that time of the necessary two-thirds under the law of shareholders, including this complainant, was lost and utterly destroyed and at the same time the shareholders and stockholders of said The Northwestern National Bank, including this complainant, thereby subjected to each and every liability to the undertaking banks that may have been or could be said to have been created by the said Price and those directors acting with and about him in that matter, for that said Price and said directors then and there permitted, to wit, in the month of March, 1927, a run upon said bank, being fully advised and informed how they might have prevented the same and how they could have taken steps to have avoided the same, but they, the said Price and his accompanying directors, although fully aware and well advised and informed of the situation, refused and failed to act or do anything to the prejudice and loss of this complainant and all other stockholders of said bank.

Par. 17. That said directors and Price with

other officers of said bank during said times and in the month of March, 1927, made some secret and undisclosed agreement, placed in charge of and with James B. Kerr and by him locked and kept or by someone under his or their [25] direction in a box or vault in Security Savings & Trust Company in the city of Portland, Oregon, wherein and whereby certain terms and conditions of transfer to said underwriting banks, to wit, The United States National Bank and the First National Bank of Portland, Oregon, is set forth with the liabilities and responsibilities involved involving the share and stockholders of said bank, and this complainant prays disclosure of said agreement so that your Honor may be and become informed thereabout for that said agreement affects the present doings of said directors undisclosed to the stockholders other than themselves, and affects the rights of and state of said bank in which complainant as shareholder and all other stockholders similarly situated are interested.

Par. 18. That up to the time the bank closed in March, 1927, the losses made by said directors, so far as this complainant can specify, amounted to more than two million dollars and impaired the capital stock of said bank, and willfully depreciated and intentionally destroyed the investment of moneys of this complainant therein made as aforesaid.

Par. 19. That up to the time said bank closed its doors and its banking business was transferred to the aforesaid named banks said directors, re-

spondents above named, did negligently, carelessly and unlawfully disclose, give out and publish, and were negligently, carelessly and unlawfully disclosing, giving out and [26] publishing private records and affairs to said competitive banks, to wit, The United States National Bank and the First National Bank, and to the directors of them the said competitive banks in the city of Portland in such way and manner as to expose, publish, announce and disclose all of the internal affairs, the loans and discounts, the transactions had and held of The Northwestern National Bank so that in the months of February and March, 1927, before said bank disclosed it, it became and was by said acts the object of suspicion, rumor and belief, giving rise to that want of confidence and there came about a want of confidence from said cause in the public mind that impaired the credit, impaired the standing and impaired the worth and facilities of said bank as a banking association, although if said directors had done and performed their full duty to said bank and its shareholders as required by the Bank Examiner and Comptroller and had lived up to the promises that they had made, no consequence would have befallen said banking business, and this complainant charges said directors and the aforesaid acts to be the cause of the ruin, wreck and disaster to said bank.

Par. 20. That this complainant is unable to specify with more particularity and certainty or definiteness the matters and things herein com-

plained about at this time, but prays the disclosure of, from and under the power and jurisdiction of this Court of all the facts and circumstances for that the records thereof and the transactions and papers and documents in respect thereto are in possession of the respondents and not [27] of this complainant, and each and every one of said respondents including said bank substantially know in detail and at all times knew in detail of the matters herein charged and specified.

Par. 21. That defendant bank through Mark Skinner, its vice-president, is now claiming against this complainant that certain moneys now are payable by this complainant to said bank notwithstanding the wrong and injustice done to complainant by said bank and by its said directors aforesaid, and they and said bank and said Skinner are threatening and intending to enforce against complainant payment of said moneys claimed payable, but if an accounting were had between said bank, said directors and complainant, it would and will be found that there is more in right, equity and justice payable to complainant than to any or either of the respondents herein; and that upon such accounting it would be found and appear that said respondents ought of right, justice and equity pay all such amounts whatever as were wholly lost to shareholders of said bank including this complainant by their actions and conduct aforesaid over and above any just credit or offset whatever, and that against complainant there is no sum or amount payable to said bank or said directors for said bank or themselves

whatever for that complainant signed no waivers or agreements or ever became in any way a party to the doings of said respondents or gave any consent or assent whatever thereto. [28]

Par. 22. This complainant further charges that the accounts in respect of the above-mentioned transactions and dealings are still open and unsettled and that if the accounts between complainant and respondents were properly taken a considerable balance would be coming from the respondents to your complainant and that said accounts or accounting cannot be properly had or taken in any other court but this wherein the respondents can make a full and true discovery and disclosure of and concerning all and singularly the transactions and matters aforesaid, so that an accounting may be taken by and under the direction and decree of this Honorable Court of all dealings and transactions between this complainant and the said respondents; that in equity and good conscience the respondents should not be allowed to charge complainant with any sums of money, but that on the contrary the respondents ought to be charged in equity with all benefit and advantage wrongfully derived or comprised in the losses hereinabove alleged as against this complainant and to specify and show all of the same, your complainant being ready and willing to submit if it should be found to the contrary to pay any balance that might be properly, equitably and justly by this Court in consonance of its course and practice found to be due if any if it should be over and above the amount lost to complainant

as hereinbefore alleged in the acts, doings and transactions of said respondents; that in the meantime the respondents and all of them should be restrained and enjoined by an injunction of this Honorable [29] Court from the continuance, accomplishment, execution or carrying out the wrongful and improper acts entered into and carried on as aforesaid and as herein specified and described, and from in any manner proceeding against your complainant or doing otherwise than to submit themselves to and unto this Court as by due process in equity they should account.

Par. 23. Forasmuch as said bank and said respective respondents, directors, will not call to account nor sue or prosecute for the many causes, acts and things herein complained about by or among themselves injuring said bank, or call each other to account in behalf of said bank and its shareholders and this complainant and of all other stockholders of said bank, this complainant is remediless in the premises, all things considered, and wholly without adequate or any remedy, speedy, sufficient or complete at law in this or any other court or anywhere, as now and during all of said times the above-named respective respondents are in full possession, control and domination of the remaining affairs and/or property or whatever it may be of said bank or of said association or bank and are claiming the right to continue to conduct the same agreeable to their own interests, their own resolves, and in perpetuation of the injustice, wrong, and the losses hereinbefore recited; and without the

intervention and exercise of the jurisdiction of this Honorable Court in equity according to its due and proper course and practice in such cases complainant cannot have or [30] obtain, nor can all other stockholders have or obtain any competent, complete, speedy, sufficient or adequate relief whatever, and if said respective respondents continue or are allowed to continue as they are now doing and continuing to do in the exercise of the corporate powers vested in said banking association, complainant and all other stockholders may and in all likelihood will lose their entire investment and be and become subjected to liability as hereinbefore set forth beyond and over to the aforesaid undertaking banks unless said respective respondents are restrained, enjoined and prevented from continuing their careless, neglectful, wrongful and undutiful financial career aforesaid.

WHEREFORE, complainant prays your Honors to consider and pronounce upon the premises aforesaid, to require the account to be made and stated, to restrain and enjoin the respondents from further acts, doings or proceedings by themselves, their agents, servants, attorneys or employees of and from any act whatever to the prejudice of this complainant or any other stockholder and to desist from the acts, doings and matters herein complained about or any furtherance or further acts in or about the same or in pursuance thereof and wholly to refrain and desist from any matter or thing whatever in pursuance or furtherance of the matters complained about, and that this Court hear and determine the

facts herein and decide and adjudge whether and to what extent and whom shall be held and adjudged liable and responsible for the losses and impairment sustained by complainant and all other stockholders of said bank; [31]

That the said respondents may set forth a list or schedule and description of every deed, book, account, letter, paper or writing relating to the matters aforesaid, or any of them, or wherein or whereupon there is any note, memorandum, or writing relating in any manner thereto, which now are, or ever were in their, or either and which of their, possession, or power, and may particularly describe which thereof now are in their, or either and which of their, possession or power, and may deposit the same with the Clerk of this Court for the usual purposes, and otherwise that the said respondents may account for such as are not in their possession or power;

And may it please your Honors to grant unto your orator a writ of subpoena, issuing out of and under the seal of this Honorable Court, to be directed to the said respondents, commanding them and each of them, on a day certain and under a certain penalty, in the said writ to be inserted, personally to be and appear before your Honors in this Honorable Court, and then and there full, true and perfect answer make, to all and singular the premises, and further, to stand, to perform and abide such further orders, direction and decree therein, as to your Honors shall seem meet and shall be agreeable to equity and good conscience;

And that complainant have such further, different, other, additional and also general relief and decree as may be in accordance with the facts and proof in equity cases according to the course and practice of this Honorable Court, with costs.

CHARLES A. BURKHARDT.

CHARLES A. BURKHARDT,

Complainant.

W. C. BRISTOL.

W. C. BRISTOL,

Solicitor and Attorney. [32]

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

I, the undersigned, Charles A. Burckhardt, being first duly sworn on oath depose and say: That I am a resident and citizen of the city of Seattle, in the State of Washington; that I am the complainant named and described in the foregoing bill of complaint; that I know the contents thereof and as to all the matters of fact therein stated I believe the same to be in all respects true, and as to all matters therein stated on information and belief so far as the knowledge of this complainant in acquiring said information and belief goes or was had or is possessed, the facts so stated on information and belief are from reliable sources and true as I believe; that the matters and things set forth in said bill of complaint are largely in possession of the respondents themselves and that this complainant verily believes the matters and things set forth are

the true state of facts in every respect so far as they have come in anywise to the knowledge of this complainant, and that upon proper order of this Court if the respondents are required to disclose and answer make it will be and appear that the facts stated are in accordance with the records and transactions that are prayed to be deposited in this court as part of this bill of complaint as set forth in the prayer thereof.

CHARLES A. BURCKHARDT.

Subscribed and sworn to before me this 1st day of November, 1927.

[Seal] L. B. BROWN,
Notary Public for Oregon.

My commission expires March 7, 1930.

Filed November 7, 1927. [33]

AND AFTERWARDS, to wit, on the 30th day of November, 1927, there was duly filed in said court, a motion of defendant Chauncey McCormick to quash service of subpoena ad respondendum and affidavit in support thereof, in words and figures as follows, to wit: [34]

[Title of Court and Cause.]

MOTION TO QUASH SERVICE OF SUBPOENA AND TO DISMISS THE SUIT AS TO THE DEFENDANT CHAUNCEY McCORMICK.

Now comes Chauncey McCormick, named as one

of the defendants in the above-entitled suit, and enters his appearance therein specially for the purpose of this motion and not otherwise, and moves for an order setting aside the alleged service of subpoena and complaint upon this defendant and dismissing the suit as to this defendant upon the ground and for the reason that the Court has no jurisdiction and that this suit is not a suit of local nature and this defendant cannot be sued therein in the District of Oregon for that this defendant is a citizen, resident and inhabitant of the Northern District of Illinois, Eastern Division at Chicago, Illinois, and not of the District of Oregon. This motion is based upon the records and files of the [35] court in this suit and upon the affidavit of J. G. Fleck hereto attached.

CAREY & KERR and
CHARLES A. HART,
Attorneys for Defendant Chauncey McCormick Appearing Specially for the Purpose of This Motion. [36]

AFFIDAVIT OF J. G. FLECK.

State of Oregon,
County of Multnomah,—ss.

I, J. G. Fleck, being first duly sworn, on oath, say that I know Chauncey McCormick named as one of the defendants in the above-entitled suit and have been well acquainted with him for several years past. I know that he resides in the city of Chicago, Illinois, and is a citizen of that state. He

has never resided within the district or state of Oregon and is not a citizen of that state.

J. G. FLECK.

Subscribed and sworn to before me this 30th day of November, 1927.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires Aug. 28, 1931. [37]

District of Oregon,
County of Multnomah,—ss.

Due service of the within motion is hereby accepted in Multnomah County, Oregon, this —— day of November, 1927, by receiving a copy thereof, duly certified to as such by Charles H. Carey, of attorneys for defendants.

W. C. BRISTOL,
By F. E. GRIGSBY,
Attorney for Plaintiff.

Filed November 30, 1927. [38]

AND AFTERWARDS, to wit, on the 17th day of December, 1927, there was duly filed in said court, an answer of defendants, Northwestern National Bank, A. D. Charlton, E. S. Collins, Natt McDougall, Frederick F. Pittock, Mark Skinner, Charles H. Stewart, O. L. Price and James F. Twohy, in words and figures as follows, to wit: [39]

[Title of Court and Cause.]

ANSWER OF DEFENDANTS, THE NORTHWESTERN NATIONAL BANK, A. D. CHARLTON, E. S. COLLINS, NATT McDOUGALL, FREDERICK F. PITTOCK, MARK SKINNER, CHARLES H. STEWART, O. L. PRICE and JAMES F. TWOHY.

Now come the defendants, The Northwestern National Bank, A. D. Charlton, E. S. Collins, Natt McDougall, Frederick F. Pittock, Mark Skinner, Charles H. Stewart, O. L. Price and James F. Twohy, and each severally and not jointly answering the bill of complaint herein, do say:

1.

These defendants admit that complainant, Charles A. Burckhardt, is a citizen and resident of the State of Washington.

Defendant Chauncey McCormick is a resident and citizen of the State of Illinois.

Defendant The Northwestern National Bank is a national banking association organized under the banking laws of the United States and doing business in the City of Portland, Oregon. [40]

Defendants O. L. Price, A. D. Charlton, E. S. Collins, Natt McDougall, Phil Metschan, Frederick F. Pittock, Mark Skinner, Charles K. Spaulding, Charles H. Stewart and James F. Twohy are and for a number of years last past have been directors of defendant The Northwestern National Bank, and each was and is a citizen and resident of Oregon.

Defendant Charles A. Morden is a citizen and resident of Oregon, and he was at one time a director of defendant The Northwestern National Bank.

It is true that defendants O. L. Price and Charles A. Morden are trustees under the last will and testament of Henry L. Pittock, deceased, and that defendant Charles A. Morden is an officer of Oregonian Publishing Company, a corporation, but these defendants aver that neither of said facts is in any respect pertinent or material to any issue herein. These defendants believe that the reference to said facts in complainant's bill is for some ulterior purpose and constitutes impertinence and these defendants pray that it be stricken from the bill.

Defendant Emery Olmstead was, prior to March 1, 1927, president and a director of defendant Bank. On that day he was succeeded as such president by defendant O. L. Price, who theretofore had been chairman of the board of directors of defendant Bank.

2.

These defendants are unable to determine from the bill of complaint herein, what amount, if any, is involved in this suit; and they leave complainant to his proof of the allegation that a sum in excess of $3,000.00 is involved. [41]

3.

These defendants are unable to determine from the bill of complaint herein whether the banking statutes referred to in paragraph 3 of the bill are,

as there asserted, a part of and involved with the subject matter of this suit, and leave complainant to his proof of that allegation.

4.

It is not the fact that any wrongs have been committed against the defendant Bank for which these defendants, who are directors, have at any time been unwilling to seek redress. On the contrary, these defendants, and each of them, at all times have been ready and willing, and now are ready and willing to sue and to call to account any and all persons or parties in any manner responsible for wrongs to defendant Bank.

It is not the fact that before the filing of the bill of complaint herein any demand was made upon defendant Bank or upon these individual defendants as its directors, to correct or right the matters referred to as wrongs in the bill of complaint; on the contrary, neither complainant, nor any other stockholder of defendant Bank has at any time made any complaint, charge, or statement to defendant Bank or any of its directors, that any such alleged wrongs had been suffered; nor has complainant or any other stockholder ever demanded or requested that any step of any kind be taken to redress such supposed wrongs or to enforce any duties or liabilities of these individual defendants as directors of defendant Bank.

Complainant is, and for a number of years last past has been, a stockholder of defendant Bank, but these defendants aver that complainant has at all times enjoyed each and all of the rights vested in

him as stockholder. The allegations [42] that these individual defendants through majority control of stock were adverse or antagonistic to complainant, or any other stockholder, and were or are attempting through such control to carry out a plan to injure defendant Bank and its minority stockholders, and each and all of the statements and insinuations of the last subparagraph of Paragraph 4 of the bill of complaint, are without any foundation in fact and are wholly false and untrue.

5.

These defendants deny that at any time in the entire history of defendant Bank there ever existed any such combination between these individual defendants for the control of the stock of defendant Bank as is alleged in Paragraph 5 of the bill of complaint. It is true that the Estate of Henry L. Pittock, of which defendants O. L. Price and Charles A. Morden are trustees, is and for several years last past has been the owner of 7,696 shares out of the total 20,000 shares of stock outstanding, and that defendant O. L. Price individually owns 290 shares and that other individuals and corporations own and hold shares of stock substantially to the number stated in Paragraph 5 of the bill of complaint, except that defendant Charles A. Morden has not been the owner of any shares of stock in defendant Bank since the year 1922. But no combination or confederation for the domination through control of a majority of the stock of defendant Bank has ever existed between these individual defendants or any of them, or between them

or any of them and Edgar B. Piper or the Miami Corporation or any other stockholder. The allegations of Paragraph 5 of the bill of complaint with respect to such [43] combination and control are without foundation in fact and are wholly false and untrue.

6.

Complainant, Charles A. Burckhardt, became a stockholder of defendant Bank on July 29, 1918, by the acquisition of 250 shares.

The allegations of Paragraph 6 of the bill of complaint to the effect that representations were made to induce complainant to acquire stock in defendant Bank are not pertinent or material to any issue herein, and these defendants pray that these allegations may be stricken from the bill of complaint. If an answer thereto be required, these defendants say that none of them solicited complainant to acquire stock in defendant Bank, or made any representation to complainant, of the kind alleged, or otherwise, to induce him to become a stockholder.

7.

The directors of defendant Bank, including these individual defendants, took the oath of office prescribed by law before entering upon the performance of their duties as such directors; and these individual defendants do severally say that they have in no manner violated said oath of office but that on the contrary they have faithfully and honestly assumed and performed the duties and obligations of their offices as such directors respectively.

8.

It is not the fact that Henry L. Pittock in his lifetime, and the trustees of his estate after his death, and any other persons or interests identified with them, dominated or [44] controlled defendant Bank from its organization down to March 29, 1927, or at any time. No such combination for control ever existed, as these defendants have pointed out in their answer to Paragraph 5 of the bill of complaint. Henry L. Pittock in his lifetime, and the trustees of his estate after his death, at no time have exercised or attempted to exercise in and about the affairs of defendant Bank any other or greater rights than those lawfully vested in them as owners of stock of defendant Bank.

9.

Increases of capital and surplus of defendant Bank were made in substantially the amounts and at about the times stated in Paragraph 9 of the bill of complaint. It is true also, although the fact is not pertinent or material to any issue herein, that at the time the capital was increased to $2,000,000 in 1922, the stockholders of defendant Bank, in order to strengthen its position and to offset inevitable and unavoidable losses due to the sudden deflation of values following the termination of the World War, also voluntarily paid in the sum of $500,000, $350,000 of which was credited to the earnings account, the remainder, $150,000, going to surplus, thereby increasing the surplus account from $250,000 to $400,000.

10.

These defendants are unable to determine the exact nature of the charge made against them in Paragraph 10 of the bill of complaint. They deny specifically that they or any of them in any manner or to any extent whatsoever, caused, required or directed to be lost the sums listed in said paragraph [45] or any sum, or any assets of said Bank.

Each of the persons and corporations listed in said paragaraph is indebted to defendant Bank and in some instances a portion of such indebtedness has been charged to profit and loss. But in each case, excepting the case of McCormick Lumber Co., the indebtedness is the result of inability on the part of the borrowers to repay when due loans made in the ordinary course of business at times and under circumstances such that these individual defendants and the officers of defendant Bank were in no manner at fault in the extension of credit. In large part these loans were made prior to the year 1920, to borrowers then financially responsible and in most instances supported by collateral entirely adequate at the time in value, and the inability of the borrowers to repay the loans when due resulted from the sudden and unexpected drop in merchandise and other values following the cessation of the World War. Since that time the officers of defendant Bank have been active and diligent in their efforts to collect said loans and substantial recoveries have been made and are still being made.

All loans made by defendant Bank to McCormick Lumber Company have been paid in full. The in-

debtedness now owing by said Lumber Company is the result of the acceptance by defendant Bank for credit to the account of the McCormick Lumber Company of certain checks and drafts, payment of which was later refused by the drawers. The acceptance of these checks and drafts for immediate credit was without the knowledge of any of these individual defendants and none of said defendants had any notice thereof or any opportunity whatever of preventing such crediting of checks and drafts, and none of [46] said defendants is in any respect chargeable with negligence or fault in respect thereto.

It is not a fact that defendants in 1925 or at any time failed, neglected or refused to comply with any direction of any Bank Examiner or other representative of the Comptroller of the Currency to reduce the line of credit granted to J. E. Wheeler or to any companies in which he was interested. All present indebtedness due from said Wheeler, Wheeler Timber Company, Wheeler Estate and Telegram Publishing Company, is the result of loans made several years prior to 1925 upon a sufficient showing of financial worth and supported in large part by adequate guaranties and/or collateral. Renewals of said loans were made from time to time when the borrowers were unable to pay at maturity, but it is not true that the Examiner of National Banks requested the so-called Wheeler lines to be reduced because too much was loaned to one person, and such renewals were never granted to disobedience to any direction or against

the advice of any Bank Examiner or other representative of the Comptroller of the Currency.

Further answering Paragraph 10 of the bill of complaint these defendants say that the loans made to the persons and corporations listed in Paragraph 10 of the bill of complaint resulted from extensions of credit granted to said borrowers prior to the year 1923. At each annual meeting of the stockholders of defendant Bank from the year 1919 down to and including the year 1927, with the exception of the year 1924, complainant was represented in person or by proxy, and at each of such annual meetings reports showing the acts of the directors for the years preceding the respective annual meetings were placed before the meeting and resolutions duly and regularly [47] adopted ratifying and approving the acts of the directors in such preceding years respectively. At the annual meeting for the year 1920, held January 30 in that year, Complainant attended in person and personally offered the resolution which was thereupon adopted approving the acts of the directors in the preceding year. Complainant therefore should be and is estopped from making any complaint of the actions of these individual defendants, who were directors, in extending credit to the persons and corporations listed in Paragraph 10 of the bill of complaint.

Further answering Paragraph 10 of the bill of complaint the defendants E. S. Collins, James Twohy, Charles H. Stewart and Mark Skinner severally say:

Defendant Collins became a director of defendant

Bank on September 25, 1923; defendant Twohy on August 31, 1922; defendant Stewart on June 20, 1922, and defendant Skinner on January 10, 1922. If complainant's bill is intended as a charge that losses were made in the amounts stated in Paragraph 10 because of improper loans, these last-named defendants say that they were not directors when the loans were made and the loss resulting therefrom, if any, accrued before they assumed office; and since their respective assumption of office no act or omission on their part or on the part of any of them has increased or affected the amount of loss, if any, attributable to such loans.

11.

The allegations of Paragraph 11 of the bill of complaint are wholly untrue. Defendant Charles A. Morden was elected a director of defendant Bank on January 11, 1921, and [48] served as such director until August 31, 1922, when he resigned, having sold his stock for a valuable consideration to defendant Mark Skinner. Defendant Morden served as a member of the Examining Committee from the time of his election as a director until the end of the year 1921 only. During this period the Examining Committee made regular reports to the directors and such reports were regularly spread upon the minutes of the meetings of the board of directors. But it is not the fact that said reports, or any of them, showed any condition of wrong administration or impending losses or any condition in the affairs of the defendant Bank requiring action by the directors to avoid loss. Dur-

ing this period and at all times the directors met regularly and carefully reviewed the reports of the Examining Committee and took such action in respect thereto as in the exercise of sound judgment seemed necessary. No reports were suppressed and nothing in the condition of the Bank as ever kept from the stockholders, and it is wholly untrue that defendant Morden resigned as director because of any such undisclosed condition in the affairs of the Bank.

It is wholly false and untrue that at any time during the existence of the defendant Bank its Examining Committee made any report which would show a favorable but incorrect condition of the Bank or any report which showed any condition of said Bank except the true condition thereof as said Examining Committee found and believed to exist and attempted to disclose by its reports. All reports of the Examining Committee were made to the board of directors of the Bank only and were thereupon placed with the minutes of the meetings of the directors, at which said reports were [49] received, and thereupon all of said reports became available for examination by all stockholders of the Bank and by the District Bank Examiner and any other representative of the Comptroller of Currency. All reports of the Examining Committee remained at all times and now remain in the minutes of the directors' meetings and were in fact read and their contents known to and understood by the District Bank Examiner, and could have been read and their contents known to and understood by

any stockholder of the Bank or any representative of the Comptroller of the Currency.

It is untrue that the Examining Committee ever made a confidential, private or secret report, or any report, to Mark Skinner, vice-president, or to other officers or directors of the Bank, which showed any condition different from that disclosed by any report made to the District Bank Examiner, or to the Comptroller of the Currency, but whether the Comptroller of the Currency in person received copies of all reports made by the Examining Committee to the board of directors, defendants cannot say, although they aver that copies of such reports of the Examining Committee were sent to the Comptroller of the Currency whenever requested.

12.

These defendants are unable to determine what is attempted to be alleged in Paragraph 12 of the bill of complaint. Pursuant to the requirements of the by-laws of defendant Bank there was at all times an executive committee consisting of a majority of the board of directors, which committee met weekly and passed on applications for credit and kept fully informed in regard to the purchase and sales of securities, loans on collateral, discounts and other business activities [50] of defendant Bank. Regular monthly monthly meeting of the board of directors were held at which the minutes of meetings of the executive committee were regularly read and submitted for approval.

There was also maintained at all times, in accordance with the by-laws of defendant Bank, an

examining committee whose duty it was to investigate the affairs and business of defendant Bank twice in each year, and said committee during all of said times carefully investigated the affairs of defendant Bank and reported the results of such investigations to the board of directors; and these defendants allege that throughout the period mentioned in the complaint every effort was made by these defendants to supervise and manage the affairs and business of defendant Bank faithfully and honestly.

On October 22, 1926, the Chief National Bank Examiner of the Twelfth Federal Reserve District advised defendant Bank by letter of the result of an examination of its assets and stated that it would be necessary to provide additional funds to the amount of not less than $1,000,000 in order that nonproducing assets in this total could be eliminated. Thereafter these defendants, acting with the approval of said Bank Examiner, undertook the organization of a corporation capitalized at $1,500,000, one-half thereof to be provided by the stockholders of defendant Bank, each stockholder subscribing $37.50 for each share of bank stock held by him, said new corporation to purchase and take over from defendant Bank nonpurchasing or "frozen" assets, as described in the report of said Bank Examiner. These defendants made every effort to consummate said plan but were unable to do so. But thereafter, following a further examination by said Bank Examiner, these [51] defendants determined that it was necessary to levy a full 100% assessment upon

the stockholders of defendant Bank, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7,696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000, and in addition guaranteed the payment of an additional sum of $1,000,000, in order to insure payment to the Bank of the full amount to accrue from said 100% assessment.

The allegation that acts or omissions of these individual defendants as directors from the time of the last increase in capital stock down to March 30, 1927, caused the defendant Bank to go into liquidation is without foundation in fact. Except as hereinabove in this answer to Paragraph 12 admitted, these defendants specifically deny each and every allegation of said Paragraph 12.

13.

It is not the fact that at any time these individual defendants as directors of defendant Bank suppressed or concealed from stockholders any information regarding the condition of the Bank and it is not true that stockholders' meetings were in any respect manipulated or controlled. No such combination among stockholders as is alleged in Paragraph 13 of the bill existed or ever was exercised to control any action at stockholders' meetings, and during the entire history of defendant Bank the rights of minority stockholders in and about the administration of the affairs of defendant Bank

were never in any degree impaired or restricted. [52]

14.

The allegations of Paragraph 14 of the bill of complaint are entirely incorrect and untrue. None of these defendants participated in any way in the acquisition of stock in defendant Bank by J. E. Wheeler, or aided him in any particular in securing credit for, or in the financing of his purchase of said stock. On the contrary, said purchase by J. E. Wheeler of stock theretofore owned by Guy M. Standifer, L. B. Menefee and R. V. Jones was consummated without the knowledge or consent of any of these defendants.

15.

The allegations of Paragraph 15 of the bill of complaint are wholly incorrect and untrue. These individual defendants were fully aware in 1925 and 1926 of the extent to which the assets of defendant Bank were nonproductive or frozen, and at all times during said years, and during the preceding years, had striven faithfully and honestly to convert said frozen assets into bankable productive commercial paper.

In June, 1926, a committee appointed by the directors, consisting of defendants Price, Metschan and Stewart, conferred with the Comptroller of the Currency and requested him to have an examination made of the condition of the Bank so that with the approval of the Comptroller, or his representative, steps could be taken for the elimination of all nonproductive or frozen assets. Thereafter

such an examination was made and other conferences were held with the Chief Bank Examiner of the Twelfth Federal Reserve District and the Comptroller, and thereafter and in December, 1926, with the approval of the Chief Bank Examiner and the Comptroller, defendant Bank and its [53] directors determined to organize a corporation with a capital of $1,500,000, one-half thereof to be provided by the stockholders of defendant Bank, each stockholder subscribing $37.50 for each share of bank stock held by him, said new corporation to purchase and take over from defendant Bank nonproducing or frozen assets as designated in the reports of the Chief Bank Examiner.

These defendants made every effort to consummate said plan but were unable to do so; and when it was ascertained that said plan could not be successfully carried through, these defendants determined that it would be necessary to levy a full 100% assessment upon the stockholders of defendant Bank, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7,696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000, and in addition guaranteed the payment of an additional sum of $1,000,000, in order to insure payment to the Bank of the full amount to accrue from said 100% assessment.

These defendants at no time failed or refused to comply with any direction or request of the Comp-

troller of the Currency. On the contrary, they at all times worked in co-operation with him, and he with them, in the effort to formulate and carry out a plan for the elimination of all nonproducing or frozen assets.

It is the fact that during the fall of 1926, or into the year 1927, as alleged in Paragraph 15 of the bill of complaint, any further loans were made or credit extended to J. E. Wheeler, either directly or upon his endorsement. On [54] the contrary, these individual defendants, for a long time prior thereto, were endeavoring in every way within their power as directors, to secure the retirement, in part at least, of the indebtedness owing by said J. E. Wheeler, and the companies in which he was interested.

No loans in excess of the amounts permitted by law were ever made by these defendants to J. E. Wheeler or to companies in which he was interested or to any other persons, firms, or corporations.

16.

The allegations of Paragraph 16 of the bill of complaint are wholly incorrect and untrue. Defendant Bank was never in a condition such that it was unable to pay its depositors upon demand until on March 28, 1927, a run upon the Bank occurred. Whereupon, defendant Bank, in order to insure full and immediate payment of all depositors on demand, entered into a contract with the United States National Bank and First National Bank of Portland under the terms of which said two Banks

agreed to advance and loan to defendant Bank all moneys necessary to enable defendant Bank to pay its depositors on demand, defendant Bank pledging to said two Banks all of its assets as collateral to said loan and in addition certain of its stockholders, including the Estate of Henry L. Pittock, individually guaranteeing repayment of said loan; and thereupon defendant Bank began liquidation of its assets in order to effect the payment of said loan to said two Banks.

Defendant O. L. Price was elected president of defendant Bank on March 1, 1927, but it is not the fact that thereafter the management of the Bank was left entirely to defendant Price, or that these individual defendants [55] in any respect, or to any degree, delegated any of their duties as directors to the president of the Bank, or to anyone else. And it is not true that in February, 1927, or in March, 1927, or at any other time, these individual defendants, as directors, by the adoption of any plans or proposals before them could have avoided the condition which made necessary in their judgment the agreement with the United States National Bank and First National Bank of Portland and the liquidation as hereinabove described. As to the supposed plans or proposals referred to in Paragraph 16 of the bill of complaint, these defendants say:

First. No plan for the reorganization of defendant Bank as a state bank and trust company was ever developed or perfected so that it was possible of accomplishment. Such a plan was at one

time suggested during the conferences with the Chief Bank Examiner hereinabove referred to, but it was rejected by defendant Bank and the Chief Bank Examiner in favor of the plan for transferring the frozen assets to a corporation to be organized with capital furnished by the stockholders of defendant Bank.

Second. So far as these defendants have ever been advised, J. E. Wheeler was never willing to turn over his assets for the protection of defendant Bank, or for the benefit of his creditors, until long after the closing of defendant Bank, although at one time said Wheeler made an indefinite proposal for an assignment provided defendant Bank would advance large additional sums of money. Certainly none of these defendants deterred or in any way prevented or dissuaded said Wheeler from any such transfer of assets, but, on the contrary, were at all times anxious and willing and often demanded that said Wheeler should liquidate his property and assets in any way possible so that his indebtedness to defendant Bank might be paid. [56]

Further answering Paragraph 16 of the bill of complaint these defendants admit that the officers and directors of defendant Bank caused to be published, on March 2, 1927, the announcement quoted on page 22 of the bill, but it is not true that the directors of the Bank left the sole management and control to defendant Price or in any manner abdicated their responsibilities as directors. Nor is it true that the run on the Bank, which occurred al-

most four weeks later, was permitted by defendant Price and these individual defendants as directors of the Bank, or any of them, or that they refrained from doing everything in their power to prevent it.

The announcement so published on March 2, 1927, resulted from the fact that at that time the directors of defendant Bank having been unable to carry through the plan for the organization of a corporation to take over non-producing or frozen assets, decided that with the consent and approval of the Chief Bank Examiner, an assessment of 100% upon the capital stock of the Bank should be made, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000, and in addition guaranteed the payment of an additional sum of $1,000,000, in order to insure payment to defendant Bank of the full amount to accrue from said 100% assessment.

17.

It is not the fact that any secret or undisclosed agreements have been made as alleged in Paragraph 17 of the bill of complaint. The agreements said to have been placed [57] in the custody of James B. Kerr are the agreements already referred to in this answer between defendant Bank and its guaranteeing stockholders on the one hand and the United States National Bank and the First National Bank of Portland on the other. Said agreements were

not kept secret, but, on the contrary, were presented to and duly ratified at a meeting of the stockholders of defendant Bank held May 3, 1927, and said agreements were thereupon spread upon the minutes of the stockholders' meeting of May 3, 1927.

18.

It is not the fact that the directors of defendant Bank made or caused losses to said Bank in two million dollars, or in any sum, nor is it the fact that the directors impaired the capital stock of the Bank or wilfully or intentionally depreciated or destroyed any investment in the stock of the Bank.

19.

It is not the fact that these defendants gave out or published improperly or carelessly or negligently or unlawfully any information about the internal affairs of the Bank that in any way caused or aided in bringing about the run upon the Bank on March 28, 1927. It is true that negotiations were had on one or more occasions for the sale and transfer to another bank of the assets, business, and goodwill of defendant Bank, and that the prospective purchaser was given such information about the properties offered for sale as was necessary to the negotiations. But the directors conducting such negotiations acted honestly and faithfully in the interest of defendant Bank and its stockholders, and at no time did they improperly disclose or make public the private affairs [58] of the Bank or give out any information which in any way worked to the disadvantage of the Bank.

20.

These defendants are ready and willing to disclose any and all facts in their possession which may be relevant or pertinent to any issue herein. But all books and records of defendant Bank are, and at all times have been, open to and available for inspection by the stockholders of defendant Bank.

21.

These defendants admit that defendant Bank is now claiming that complainant is indebted to defendant Bank. Except as thus admitted these defendants specifically deny each and every allegation of Paragraph 21 of the bill of complaint.

Complainant is indtebted to defendant Bank in the sum of $30,000, with accrued and accruing interest. For a number of years prior to July 25, 1927, complainant was indebted to defendant Bank in the sum of $40,000, and on July 25, 1927, the indebtedness was reduced to $30,000 by the payment of $10,000 on account. Defendant Bank has made many demands upon complainant for the payment of this indebtedness but excepting for the payment of $10,000 so made on July 25, 1927, the principal of said loan has not been reduced but complainant has insisted upon renewals of his notes as they respectively matured. In the report of the examination made by the Chief National Bank Examiner of the Twelfth Federal Reserve District on October 22, 1926, referred to hereinabove in the answer to Paragraph 12 of the bill of complaint, the indebtedness due defendant Bank from complainant was listed as a nonbankable [59] item, and defendant Bank

at that time, and before and after that time, constantly demanded of complainant that this indebtedness be paid. These defendants say that nothing in any of the matters attempted to be set out in complainant's bill justifies complainant's failure to pay his indebtedness to defendant Bank, but that defendant Bank should be permitted, notwithstanding complainant's demands herein, to enforce immediate payment by complainant of the principal and interest of his debt.

22.

The answer made by these defendants to Paragraph 21 of the bill of complaint sufficiently answers Paragraph 22 of the bill. No accounting of any kind is due complainant from defendant Bank or from any of these defendants, and complainant should not be permitted to use the demands or claims asserted in his bill as an excuse for withholding payment of his overdue obligation to defendant Bank.

23.

For their answer to Paragraph 23 of the bill of complaint these defendants say that the bill is without equity. These individual defendants and defendant Bank have not at any time refrained, and are not now refraining, from any necessary or proper step for the redress of any wrong done to defendant Bank, but nothing in any of the matters attempted to be stated in the bill justifies the charge that any director has committed any wrong toward defendant Bank, and no stockholder, prior to the institution of this suit, has ever made any complaint

to defendant Bank, or its directors, of any such wrong, nor has any demand ever been made for the redress of any such supposed wrong. [60]

The control which these individual defendants now have over the affairs and property of defendant Bank is that only which these individual defendants as directors and officers of defendant Bank should properly and lawfully exercise, and it is, and at all times has been, in subordination to the rights of the stockholders under the articles of incorporation and by-laws duly adopted.

WHEREFORE, These defendants, having fully answered the bill of complaint herein, pray that they be hence dismissed with costs and their disbursements herein taxed against complainant.

CHARLES H. CAREY,
JAMES B. KERR,
CHARLES A. HART,
CHARLES E. McCULLOCH,

Attorneys for the Above-named Answering Defendants.

CAREY AND KERR,
Of Counsel.
M. A. ZOLLINGER,
Of Counsel for Defendant E. S. Collins.
[61]

State of Oregon,
County of Multnomah,—ss.

I, O. L. Price, make solemn oath and say, I am president of The Northwestern National Bank, a corporation, one of the above-named defendants; so much of the foregoing answer as concerns my own

acts and deeds is true to the best of my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

O. L. PRICE.

Subscribed and sworn to before me this 15th day of December, 1927.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

State of Oregon,
County of Multnomah,—ss.

I, A. D. Charlton, make solemn oath and say: I am one of the above-named defendants; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

A. D. CHARLTON.

Subscribed and sworn to before me this 15th day of December, 1927.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

State of Oregon,
County of Multnomah,—ss.

I, E. S. Collins, make solemn oath and say: I am one of the above-named defendants; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge

and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

E. S. COLLINS.

Subscribed and sworn to before me this 16th day of December, 1927.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires Aug. 28, 1931. [62]

State of Oregon,
County of Multnomah,—ss.

I, Natt McDougall, make solenm oath and say: I am one of the above-named defendants; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

NATT McDOUGALL.

Subscribed and sworn to before me this 16th day of December, 1927.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

State of Oregon,
County of Multnomah,—ss.

I, Frederick F. Pittock, make solemn oath and say: I am one of the above-named defendants; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge, and so much thereof as concerns the acts or

deeds of any other person or persons I believe to be true.

FREDERICK F. PITTOCK,

Subscribed and sworn to before me this 15th day of December, 1927.

[Notarial Seal] I. F. PHIPPS,
Notary Public for Oregon.

My commission expires Dec. 21, 1928.

State of Oregon,
County of Multnomah,—ss.

I, Mark Skinner, make solemn oath and say: I am one of the above-named defendants; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

MARK SKINNER.

Subscribed and sworn to before me this 15th day of December, 1927.

[Notarial Seal] I. F. PHIPPS,
Notary Public for Oregon.

My commission expires Dec. 21, 1928. [63]

State of Oregon,
County of Multnomah,—ss.

I, Charles H. Stewart, make solemn oath and say: I am one of the above-named defendants; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

CHARLES H. STEWART.

Subscribed and sworn to before me this 15th day of December, 1927.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

State of Oregon,
County of Multnomah,—ss.

I, O. L. Price, make solemn oath and say: I am one of the above-named defendants; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

O. L. PRICE.

Subscribed and sworn to before me this 15th day of December, 1927.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

State of Oregon,
County of Multnomah,—ss.

I, Charles A. Hart, make solemn oath and say: I am attorney for James F. Twohy, one of the above-named defendants; I have read and know the contents of the foregoing answer made on behalf of said defendant and I believe it to be true; and I make this verification on behalf of the defendant James F. Twohy because said defendant is absent from the District of Oregon, wherein this suit is brought.

CHARLES A. HART.

Subscribed and sworn to before me this 16th day of December, 1927.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires Aug. 28, 1931. [64]

District of Oregon,
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 17th day of December, 1927, by receiving a copy thereof, duly certified to as such by Charles A. Hart, of attorneys for within named defendants.

W. C. BRISTOL,
Attorney for Plaintiff.

Filed December 17, 1927. [65]

AND AFTERWARDS, to wit, on the 19th day of December, 1927, there was duly filed in said court, an answer of defendant, Charles K. Spaulding, in words and figures as follows, to wit: [66]

[Title of Court and Cause.]

ANSWER OF DEFENDANT CHARLES K. SPAULDING.

Now comes the defendant Charles K. Spaulding, and answering the bill of complaint herein says:

I.

This answering defendant admits that complain-

ant, Charles A. Burckhardt is a citizen and resident of the State of Washington.

Defendant Chauncey McCormick is a resident and citizen of the State of Illinois.

Defendant The Northwestern National Bank is a national banking association organized under the banking laws of the United States and does business in the city of Portland, Oregon.

Defendants O. L. Price, A. D. Charlton, E. S. Collins, Natt McDougall, Phil Metschan, Frederick F. Pittock, Mark Skinner, Charles K. Spaulding, Charles H. Stewart and James F. Twohy are and for a number of years last past have been directors of defendant The Northwestern National Bank, and each was and is a citizen and resident of Oregon.

Defendant Charles A. Morden is a citizen and resident of Oregon and was at one time a director of defendant The Northwestern National [67] Bank.

It is true that defendants O. L. Price and Charles A. Morden are trustees under the last will and testament of Henry L. Pittock, deceased, and that defendant Charles A. Morden is an officer of the Oregonian Publishing Company, a corporation, but this defendant avers that neither of said facts is in any respect pertinent or material to any issue herein. This defendant believes that the reference to said facts in complainant's bill is for some ulterior purpose and constitutes impertinence.

Defendant Emery Olmstead was, prior to March 1, 1927, president and a director of said bank. On

that day he was succeeded as such president by defendant O. L. Price, who theretofore had been chairman of the board of directors of defendant bank.

2.

This defendant is unable to determine from the bill of complaint herein, what amount, if any, is involved in this suit; and he leaves complainant to his proof of the allegation that a sum in excess of $3,000.00 is involved.

3.

This defendant is unable to determine from the bill of complaint herein whether the banking statutes referred to in Paragraph 3 of the bill are, as there asserted, a part of and involved with the subject matter of this suit, and denies that the laws referred to in Paragraph 3 of the bill are a part of or involved in this suit.

4.

It is not the fact that any wrongs have been committed against the defendant Bank for which the defendants who are and were directors have at any time been unwilling to seek redress. On the contrary, the defendants who are or were directors, and each of them, at all times have been ready and willing, and are now ready and willing to sue and [68] to call to account any and all persons or parties in any manner responsible for wrongs to defendant Bank.

It is not the fact that before the filing of the bill of complaint herein any demand was made upon

defendant Bank or upon the individual defendants as its directors, to correct or right the matters referred to as wrongs in the bill of complaint; on the contrary, neither complainant, nor any other stockholder of defendant Bank has at any time made any complaint, charge, or statement to defendant Bank or any of its directors, that any such alleged wrongs had been suffered; nor has complainant or any other stockholder ever demanded or requested that any step or any kind be taken to redress such supposed wrongs or to enforce any duties or liabilities of the individual defendants as directors of defendant Bank or otherwise.

Complainant is, and for a number of years last past has been, a stockholder of defendant Bank, but this defendant avers that complainant has at all times enjoyed each and all of the rights vested in him as stockholder. The allegations that the individual defendants through majority control of stock were or are adverse or antagonistic to complainant, or any other stockholder, or were or are attempting through such control to carry out a plan to injure defendant Bank and its minority stockholders, and each and all of the statements and insinuations of the last subparagraph of Paragraph 4 of the bill of complaint, are without any foundation in fact and are untrue and are denied.

5.

This defendant denies that at any time in the entire history of defendant Bank there ever existed any such combination between the individual de-

fendants for the control of the stock of defendant Bank as is alleged in Paragraph 5 of the bill of complaint, or otherwise or at all. It is true that the Estate of Henry L. Pittock, of which [69] defendants O. L. Price and Charles A. Morden are trustees, is and for several years last past has been the owner of 7696 shares out of the total 20,000 shares of stock outstanding, and that defendant O. L. Price individually owns 290 shares and that other individuals and corporations own and hold shares of stock substantially to the number stated in Paragraph 5 of the blil of complaint, except that defendant Charles A. Morden has not been the owner of any shares of stock in defendant Bank since the year 1922. But no combination or confederation for the domination through control of a majority of the stock of defendant Bank has ever existed between this defendant and any other director or stockholder.

As they have reference to this defendant the allegations of Paragraph 5 of the bill of complaint with respect to such combination and control are without foundation in fact and are untrue and are denied.

6.

Complainant, Charles A. Burckhardt, became a stockholder of defendant bank on July 29, 1918, by the acquisition of 250 shares.

The allegations of Paragraph 6 of the bill of complaint to the effect that representations were made to induce complainant to acquire stock in defendant Bank are not pertinent or material to any issue

herein. If an answer thereto be required, this defendant says that he did not solicit complainant to acquire stock in defendant Bank, or make any representation to complainant, of the kind alleged, or otherwise, to induce him to become a stockholder.

7.

The directors of defendant Bank, including this defendant, took the oath of office prescribed by law before entering upon the performance of their duties as such directors; and this defendant says that he has in no manner violated said oath of office but on the contrary he has faithfully and honestly assumed and performed the duties and obligations of his office as such director. [70]

8.

It is not the fact that Henry L. Pittock in his lifetime or the trustees of his estate after his death, or any other persons or interests identified with them, dominated or controlled defendant Bank from its organization down to March 29, 1927, or at any time. No such combination for control ever existed, as this defendant has pointed out in his answer to Paragraph 5 of the bill of complaint. Henry L. Pittock in his lifetime, and the trustees of his estate after his death, at no time have exercised or attempted to exercise in or about the affairs of defendant Bank any other or greater rights than those lawfully vested in them as owners of stock of defendant Bank. This defendant avers that during all the time he was a director of the defendant Bank that he was independent of the

domination or control of any person, persons, or corporation, and that at all of such times he acted individually as he deemed to be for the best interests of the Bank and all of its stockholders.

9.

Increases of capital and surplus of defendant Bank were made in substantially the amounts and at about the times stated in Paragraph 9 of the bill of complaint. It is true also, although the fact is not pertinent or material to any issue herein, that at the time the capital was increased to $2,000,000 in 1922, the stockholders of defendant Bank, in order to strengthen its position and to offset inevitable and unavoidable losses due to the sudden deflation of values following the termination of the World War, also voluntarily paid in the sum of $500,000, *$350.00* of which was credited to the earnings account, the remainder, $150,000, going to surplus, thereby increasing the surplus account from $250,000 to $400,000.

10.

This defendant is unable to determine the nature of the charge made against the defendants in Paragraph 10 of the bill of complaint. He denies specifically that he in any manner or to any extent whatsoever, [71] caused, required, or directed to be lost the sums listed in said paragraph or any sum, or any assets of said Bank.

Each of the persons and corporations listed in said Paragraph is indebted to defendant Bank and in some instances a portion of such indebtedness has

been charged to profit and loss. But in each case, excepting the case of McCormick Lumber Co., the indebtedness is the result of inability on the part of the borrowers to repay when due loans made in the ordinary course of business at times and under circumstances such that this individual defendant was in no manner at fault in the extension of credit. In large part these loans were made prior to the year 1920, to borrowers then financially responsible and in most instances supported by collateral entirely adequate at the time in value, and the inability of the borrowers to repay the loans when due resulted from the sudden and unexpected drop in merchandise and other values following the cessation of the World War. Since that time the officers of defendant Bank have been active and diligent in their effort to collect said loans and substantial recoveries have been made and are still being made thereon.

All loans made by defendant Bank to McCormick Lumber Company have been paid in full. The indebtedness now owing by said Lumber Company is the result of the acceptance by defendant Bank for credit to the account of the McCormick Lumber Company of certain checks and drafts, payment of which was later refused by the drawers. The acceptance of these checks and drafts for immediate credit was without the knowledge of this defendant and he had no notice thereof or opportunity whatever of preventing such crediting of either checks or drafts, and he is in no respect chargeable with negligence or fault in respect thereto.

It is not the fact that this defendant in 1925 or at any time failed, neglected or refused to comply with any direction from any Bank Examiner or other representative of the Comptroller of the Currency to reduce the line of credit granted to J. E. Wheeler or to [72] any companies in which he was interested. All present indebtedness due from said Wheeler, Wheeler Timber Company, Wheeler Estate, and Telegram Publishing Company, is the result of loans made several years prior to 1925 upon a sufficient showing of financial worth and supported in large part*y* by adequate guaranties and/or collateral. Renewals of said loans were made from time to time when the borrowers were unable to pay at maturity, but it is not true that the Examiner of National Banks requested the so-called Wheeler lines to be reduced because too much was loaned to one person, and such renewals were never granted in disobedience to any direction or against the advice of any Bank Examiner or other representative of the Comptroller of the Currency.

Further answering Paragraph 10 of the bill of complaint this defendant says that the loans made to the persons and corporations listed in Paragraph 10 of the bill of complaint resulted from extensions of credit granted to said borrowers prior to the year 1923. At each annual meeting of the stockholders of defendant Bank from the year 1919 down to and including the year 1927, with the exception of the year 1924, complainant was represented in person or by proxy, and at each of such annual meetings

reports showing the acts of the directors for the years preceding the respective annual meetings were placed before the meeting and resolutions duly and regularly adopted ratifying and approving the acts of the directors in such preceding years respectively. At the annual meeting for the year 1920, held January 30, in that year, complainant attended in person and personally offered the resolution which was thereupon adopted approving the acts of the directors in the preceding year. Complainant therefore should be and is estopped from making any complaint of the actions of this defendant, who was a director, in extending credit to the persons and corporations listed in Paragraph 10 of the bill of complaint, and should be and is estopped from averring or proving the same.

Further answering Paragraph 10 of the bill of complaint, defendant [73] says, that he became a director of defendant Bank on the 31st day of August, 1922. If complainant's bill is intended as a charge that losses were made in the amounts stated in Paragraph 10 because of improper loans, this defendant says that he was not a director of the defendant Bank when the loans were made and the losses resulting therefrom, if any, accrued before he assumed office; and since his assumption of office no act or omission on his part or on the part of *any the* directors has increased or affected the amount of loss, if any, attributable to such loans.

11.

The allegations of Paragraph 11 of the bill of

complaint are untrue and are denied. Defendant Charles A. Morden was elected a director of defendant Bank on January 11, 1921, and served as such director until August 31, 1922, when he resigned, having sold his stock for a valuable consideration to the defendant Mark Skinner. Defendant Morden served as a member of the Examining Committee from the time of his election as a director until the end of the year 1921 only. The defendant Spaulding was elected and became a member of the Examining Committee on the —— day of ——, 1923. During this period the Examining Committee made regular reports to the directors and such reports were regularly spread upon the minutes of the meetings of the board of directors. But it is not the fact that said reports, or any of them, showed any condition of wrong administration or impending losses or any condition in the affairs of the defendant Bank requiring action by the directors to avoid loss. During this period and at all times the directors met regularly and carefully reviewed the reports of the Examining Committee and took such action in respect thereto as in the exercise of sound judgment seemed necessary. No reports were suppressed and nothing in the condition of the Bank was ever kept from the stockholders, and it is untrue that the defendant Morden resigned as director because of any such undisclosed condition [74] in the affairs of the Bank.

It is not true that at any time during the existence of the defendant Bank its Examining Committee made any report which would show a favorable

but incorrect condition of the Bank or any report which showed any condition of said Bank except the true condition thereof as said Examining Committee found and believed to exist and attempted to disclose by its reports. All reports of the Examining Committee were made to the board of directors of the Bank only and were thereupon placed with the minutes of the meetings of the directors, at which said reports were received, and thereupon all of said reports became available for examination by all of the stockholders of the Bank and by the District Bank Examiner and any other representative of the Comptroller of the Currency. All reports of the Examining Committee remained at all times and now remain in the minutes of the directors' meetings and were in fact read and their contents known to and understood by the District Bank Examiner, and could have been read and their contents known to and understood by any stockholder of the Bank or any representative of the Comptroller of the Currency.

It is untrue that the Examining Committee ever made a confidential, private or secret report, or any report, to Mark Skinner, vice-president, or to other officers or directors of the Bank, or to the directors of said Bank, which showed any condition different from that disclosed by any report made to the District Bank Examiner, or to the Comptroller of the Currency, but whether the Comptroller of the Currency in person received copies of all reports made by the Examining Committee to the board of directors, defendant cannot say, although he avers that

copies of such reports of the Examining Committee were sent to the Comptroller of the Currency whenever requested. [75]

12.

This defendant is unable to determine what is attempted to be alleged in Paragraph 12 of the bill of complaint. Pursuant to the requirements of the by-laws of defendant Bank there was at all times an executive committee consisting of a majority of the board of directors, which committee met weekly and passed on applications for credit and kept fully informed in regard to the purchase and sales of securities, loans on collateral, discounts and other business activities of defendant Bank. Regular monthly meetings of the board of directors were held at which the minutes of meetings of the executive committee were regularly read and submitted for approval.

There was also maintained at all times, in accordance with the by-laws of defendant Bank, an examining committee whose duty it was to investigate the affairs and business of defendant Bank twice in each year, and said committee during all of said times carefully investigated the affairs of defendant Bank and reported the results of such investigations to the board of directors; and this defendant alleges that throughout the period mentioned in the complaint every effort was made by him with respect to all matters coming within the scope of his office or duty as a director to supervise and manage the affairs and business of defendant Bank faithfully and honestly.

On October 22, 1926, the Chief National Bank Examiner of the Twelfth Federal Reserve District advised defendant Bank by letter of the result of an examination of its assets and stated that it would be necessary to provide additional funds to the amount of not less than $1,000,000 in order that non-producing assets in this total could be eliminated. Thereafter this defendant, with other defendants, acting with the approval of said Bank Examiner, undertook the organization of a corporation capitalized at $1,500,000, one-half thereof to be provided [76] by the stockholders of defendant Bank, each stockholder subscribing $37.50 for each share of bank stock held by him, said new corporation to purchase and take over from defendant Bank nonproducing or "frozen" assets, as described in the report of said Bank Examiner. Such acting defendants made every effort to consummate said plan but were unable to do so. But thereafter, following a further examination by said Bank Examiner, it was determined that it was necessary to levy a full 100% assessment upon the stockholders of defendant Bank, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000, and in addition guaranteed the payment of an additional sum of $1,000,000, in order to insure payment to the Bank of the full amount to accrue from said 100% assessment.

The allegation that acts or omissions of this defendant, as a director or otherwise, caused the defendant Bank to go into liquidation is untrue.

Except as hereinabove in this answer to Paragraph 12 admitted, this defendant specifically denies each and every allegation of said Paragraph 12.

13.

It is not the fact that at any time this defendant suppressed or concealed from stockholders any information regarding the condition of the Bank, and it is not true that stockholders' meetings were in any respect manipulated or controlled by this defendant or any person in combination with him. No such combination among stockholders as alleged in Paragraph 13 of the bill existed, and during the entire history of defendant Bank the rights of minority stockholders in the administration of its affairs were never in any degree impaired or restricted. [77]

14.

The allegations of Paragraph 14 of the bill of complaint are untrue. This defendant did not participate in any way in the acquisition of stock in defendant Bank by J. E. Wheeler, or aid him in any particular in securing credit for, or in the financing of his purchase of said stock. On the contrary, said purchase by J. E. Wheeler of stock theretofore owned by Guy M. Standifer, L. B. Menefee and R. V. Jones was consummated without the knowledge or consent of this defendant.

15.

The allegations of Paragraph 15 of the bill of complaint are untrue. This defendant was fully aware in 1925 and 1926 of the extent to which the assets of defendant Bank were nonproductive or frozen, and at all times during said years, and during the preceding years, had striven faithfully and honestly to convert said frozen assets into bankable productive commercial paper.

In June, 1926, a committee appointed by the directors, consisting of defendants Price, Metschan and Stewart, conferred with the Comptroller of the Currency and requested him to have an examination made of the condition of the Bank so that with the approval of the Comptroller, or his representative, steps could be taken for the elimination of all nonproductive or frozen assets. Thereafter such an examination was made and other conferences were held with the Chief Bank Examiner of the Twelfth Federal Reserve District and the Comptroller, and thereafter and in December, 1926, with the approval of the Chief Bank Examiner and the Comptroller, defendant Bank and its directors determined to organize a corporation with a capital of $1,500,000, one-half thereof to be provided by the stockholders of defendant Bank, each stockholder subscribing $37.50 for each share of bank stock held by him, said new corporation [78] to purchase and take over from defendant Bank nonproducing or frozen assets as designated in the reports of the Chief Bank Examiner.

This defendant and other defendants made every

effort to consummate said plan but were unable to do so; and when it was ascertained that said plan could not be successfully carried through, it was determined to be necessary to levy a full 100% assessment upon the stockholders of defendant Bank, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7,696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000, and in addition guaranteed the payment of an additional sum of $1,000,000, in order to insure payment to the Bank of the full amount to accrue from said 100% assessment.

This defendant at no time failed or refused to comply with any direction or request of the Comptroller of the Currency. On the contrary, he at all times worked in co-operation with him, in the effort to formulate and carry out a plan for the elimination of all nonproducing or frozen assets.

It is not the fact that during 1926, or the year 1927, as alleged in Paragraph 15 of the bill of complaint, any further loans were made or credit extended to J. E. Wheeler, either directly or upon his endorsement. On the contrary, this defendant for a long time prior thereto was endeavoring in every way within his power as director, to secure the retirement, in part at least, of the indebtedness owing by said J. E. Wheeler, and the companies in which he was interested.

No loans in excess of the amounts permitted by

law were ever made by the board of directors of said Bank to J. E. Wheeler or to companies in which he was interested or to any other persons, [79] firms, or corporations.

16.

The allegations of Paragraph 16 of the bill of complaint are untrue. Defendant Bank was never in such a condition that it was unable to pay its depositors upon demand until on March 28, 1927, a run upon the Bank occurred. Whereupon, defendant Bank, in order to insure full and immediate payment to all depositors on demand, entered into a contract with United States National Bank and First National Bank of Portland under the terms of which said two Banks agreed to advance and loan to defendant Bank all moneys necessary to enable defendant Bank to pay its depositors on demand, defendant Bank pledging to said two Banks all of its assets as collateral to said loan and in addition certain of its stockholders, including the Estate of Henry L. Pittock, individually guaranteeing repayment of said loan; and thereupon defendant Bank began liquidation of its assets in order to effect the payment of said loan to said two Banks.

Defendant O. L. Price was elected president of defendant Bank on March 1, 1927, but it is not the fact that thereafter the management of the Bank was left entirely to defendant Price, or that this defendant in any respect, or to any degree, delegated any of his duties as director to the president of the Bank, or to anyone else. And it is not true

that in February, 1927, or in March, 1927, or at any other time, the directors, by the adoption of any plans or proposals before them, could have avoided the condition which made necessary in their judgment the agreement with United States National Bank and First National Bank of Portland and the liquidation as hereinabove described. As to the supposed plans or proposals referred to in Paragraph 16 of the bill of complaint, this defendant says:

First. No plan for the reorganization of defendant Bank as a state bank and trust company was ever developed or [80] perfected so that it was possible of accomplishment. Such a plan was at one time suggested during the conferences with the Chief Bank Examiner hereinabove referred to, but it was rejected by defendant Bank and the Chief Bank Examiner in favor of the plan for transferring the frozen assets to a corporation to be organized with capital furnished by the stockholders of defendant Bank.

Second. So far as this defendant has even been advised, J. E. Wheeler was never willing even to consider turning over his assets for the protection of defendant Bank, or for the benefit of his creditors, until long after the closing of defendant Bank. This defendant did not deter or in any way prevent or dissuade said Wheeler from any such transfer of assets, but, on the contrary, was at all times anxious and willing and often demanded that said Wheeler liquidate his property and assets in any way possible so that his indebtedness to defendant Bank might be paid.

Further answering Paragraph 16 of the bill of complaint, this defendant admits that the officers and directors of defendant Bank caused to be published on March 2, 1927, the announcement quoted on page 22 of the bill, but it is not true that the directors of the Bank left the sole management and control to defendant Price or in any manner abdicated their responsibilities as directors. Nor is it true that the run on the Bank, which occurred almost four weeks later, was permitted by defendant Price or any of the then directors of the Bank, or that they refrained from doing everything in their power to prevent it.

The announcement so published on March 2, 1927, resulted from the fact that at that time the directors of defendant Bank having been unable to carry through the plan for the organization of a corporation to take over nonproducing or frozen assets, decided that with the consent and approval of the Chief Bank Examiner, an assessment of 100% upon the [81] capital stock of the Bank should be made, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7,696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000, and in addition guaranteed the payment of an additional sum of $1,000,000, in order to insure payment to defendant Bank of the full amount to accrue from said 100% assessment.

17.

It is not the fact that any secret or undisclosed agreements have been made as alleged in Paragraph 17 of the bill of complaint. The agreements said to have been placed in the custody of James B. Kerr are the agreements already referred to in this answer between defendant Bank and its guaranteeing stockholders on the one hand and the United States National Bank and the First National Bank of Portland on the other. Said agreements were not kept secret, but, on the contrary, were presented to and duly ratified at a meeting of the stockholders of defendant Bank held May 3, 1927, and said agreements were thereupon spread upon the minutes of the stockholders' meeting of May 3, 1927.

18.

It is not the fact that the directors of defendant Bank made or caused losses to said Bank in two million dollars, or in any sum, nor is it the fact that the directors impaired the capital stock of the Bank or wilfully or intentionally depreciated or destroyed any investment in the stock of the Bank.

19.

It is not the fact that this defendant gave out or published improperly or carelessly or negligently or unlawfully or at all, any information about the internal affairs of the Bank. [82] It is true that negotiations were had on one or more occasions for the sale and transfer to another bank of the assets, business, and goodwill of defendant Bank, and that the prospective purchaser was given such informa-

tion about the properties offered for sale as was necessary to the negotiations. But the directors conducting such negotiations acted honestly and faithfully in the interest of defendant Bank and its stockholders, and at no time did they improperly disclose or make public the private affairs of the Bank or give out any information which in any way worked to the disadvantage of the Bank.

20.

This defendant is ready and willing to disclose any and all facts in their possession which may be relevant or pertinent to any issue herein. But all books and records of defendant Bank are, and at all times have been, open to and available for inspection by the stockholders of defendant Bank, but none of said books or records is in the possession of this defendant.

21.

This defendant admits that defendant Bank is now claiming that complainant is indebted to defendant Bank. Except as thus admitted this defendant specifically denies each and every allegation of Paragraph 21 of the bill of complaint.

Complainant is indebted to defendant Bank in the sum of $30,000, with accrued and accruing interest. For a number of years prior to July 25, 1927, complainant was indebted to defendant Bank in the sum of $40,000, and on July 25, 1927, the indebtedness was reduced to $30,000 by the payment of $10,000 on account. Defendant Bank has made many demands upon complainant for the payment

of this indebtedness but excepting for the payment of $10,000 so made on July 25, 1927, the principal of said loan has not ben reduced but complainant has insisted upon renewals of his notes as they respectively matured. [83] In the report of the examination made by the Chief National Bank Examiner of the Twelfth Federal Reserve District on October 22, 1926, referred to hereinabove in the answer to Paragraph 12 of the bill of complaint, the indebtedness due defendant Bank from complainant was listed as a nonbankable item, and defendant Bank at that time, and before and after that time, constantly demanded of complainant that this indebtedness be paid. This defendant says that nothing in any of the matters attempted to be set out in complainant's bill justifies complainant's failure to pay his indebtedness to defendant Bank, but that defendant Bank should be permitted, notwithstanding complainant's demands herein, to enforce immediate payment by complainant of the principal and interest of his debt.

22.

The answer made by this defendant to Paragraph 21 of the bill of complaint sufficiently answers Paragraph 22 of the bill. No accounting of any kind is due complainant from defendant Bank or from this defendant, and complainant should not be permitted to use the demands or claims asserted in his bill as an excuse for withholding payment of his overdue obligation to defendant Bank.

23.

For his answer to Paragraph 23 of the bill of

complaint this defendant says that the bill is without equity. This defendant and defendant Bank have not at any time refrained, and are not now refraining, from any necessary or proper step for the redress of any wrong done to defendant Bank, but nothing in any of the matters attempted to be stated in the bill justifies the charge that this defendant has committed any wrong upon said Bank, and no stockholder, prior to the institution of this suit, has ever made any complaint to defendant [84] Bank, or its directors, of any such wrong, nor has any demand ever been made for the redress of any such supposed wrong.

This defendant denies that he now has or ever has controlled the affairs of the defendant Bank, and avers that at all times in his actions as a director and stockholder he has been faithful to the rights of the Bank and of the stockholders and creditors thereof.

WHEREFORE, this defendant, having fully answered the bill of complaint herein, prays that he be hence dismissed with costs and his disbursements herein taxed against complainant.

WINTER & MAGUIRE,
Attorneys for Defendant Charles K. Spaulding.

State of Oregon,
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 19th day of December, 1927, by receiving a copy thereof,

duly certified to as such by Robert F. Maguire of attorneys for Charles K. Spaulding.

W. C. BRISTOL,
Attorney for Complainant.

Filed December 19, 1927. [85]

AND AFTERWARDS, to wit, on the 19th day of December, 1927, there was duly filed in said court, an answer of defendant Phil Metschan, in words and figures as follows, to wit: [86]

[Title of Court and Cause.]

ANSWER OF DEFENDANT PHIL METSCHAN.

Now comes the defendant Phil Metschan and answering the bill of complaint herein says:

I.

This answering defendant admits that complainant, Charles A. Burckhardt is a citizen and resident of the State of Washington.

Defendant Chauncey McCormick is a resident and citizen of the State of Illinois.

Defendant The Northwestern National Bank is a national banking association organized under the banking laws of the United States and does business in the city of Portland, Oregon.

Defendants O. L. Price, A. D. Charlton, E. S. Collins, Natt McDougall, Phil Metschan, Frederick F. Pittock, Mark Skinner, Charles K. Spaulding, Charles H. Stewart and James F. Twohy are and

for a number of years last past have been directors of defendant The Northwestern National Bank, and each was and is a citizen and resident of Oregon.

Defendant Charles A. Morden is a citizen and resident of Oregon and was at one time a director of defendant The Northwestern National [87] Bank.

It is true that defendants O. L. Price and Charles A. Morden are trustees under the last will and testament of Henry L. Pittock, deceased, and that defendant Charles A. Morden is an officer of the Oregonian Publishing Company, a corporation, but this defendant avers that neither of said facts is in any respect pertinent or material to any issue herein. This defendant believes that the reference to said facts in complainant's bill is for some ulterior purpose and constitutes impertinence.

Defendant Emery Olmstead was, prior to March 1, 1927, president and a director of said bank. On that day he was succeeded as such president by defendant O. L. Price, who theretofore had been chairman of the board of directors of defendant bank.

2.

This defendant is unable to determine from the bill of complaint herein, what amount, if any, is involved in this suit; and he leaves complainant to his proof of the allegation that a sum in excess of $3,000.00 is involved.

3.

This defendant is unable to determine from the bill of complaint herein whether the banking stat-

utes referred to in Paragraph 3 of the bill are, as there asserted, a part of and involved with the subject matter of this suit, and denies that the laws referred to in Paragraph 3 of the bill are a part of or involved in this suit.

4.

It is not the fact that any wrongs have been committed against the defendant Bank for which the defendants who are and were directors have at any time been unwilling to seek redress. On the contrary, the defendants who are or were directors, and each of them, at all times have been ready and willing to sue and [88] to call to account any and all persons or parties in any manner responsible for wrongs to defendant Bank.

It is not the fact that before the filing of the bill of complaint herein any demand was made upon defendant Bank or upon the individual defendants as its directors, to correct or right the matters referred to as wrongs in the bill of complaint; on the contrary, neither complainant, nor any other stockholder of defendant Bank has at any time made any complaint, charge, or statement to defendant Bank or any of its directors, that any such alleged wrongs had been suffered; nor has complainant or any other stockholder ever demanded or requested that any step of any kind be taken to redress such supposed wrongs or to enforce any duties or liabilities of the individual defendants as directors of defendant Bank or otherwise.

Complainant is, and for a number of years last

past has been, a stockholder of defendant Bank, but this defendant avers that complainant has at all times enjoyed each and all of the rights vested in him as stockholder. The allegations that the individual defendants through majority control of stock were or are adverse or antagonistic to complainant, or any other stockholder, or were or are attempting through such control to carry out a plan to injure defendant Bank and its minority stockholders, and each and all of the statements and insinuations of the last subparagraph of Paragraph 4 of the bill of complaint, are without any foundation in fact and are untrue and are denied.

5.

This defendant denies that at any time in the entire history of defendant Bank there ever existed any such combination between the individual defendants for the control of the stock of defendant Bank as is alleged in Paragraph 5 of the bill of complaint, or otherwise or at all. It is true that the Estate of Henry L. Pittock, of which [89] defendants O. L. Price and Charles A. Morden are trustees, is and for several years last past has been the owner of 7,696 shares out of the total 20,000 shares of stock outstanding, and that defendant O. L. Price individually owns 290 shares and that other individuals and corporations own and hold shares of stock substantially to the number stated in Paragraph 5 of the bill of complaint, except that defendant Charles A. Morden has not been the owner of any shares of stock in defendant Bank

since the year 1922. But no combination or confederation for the domination through control of a majority of the stock of defendant Bank has ever existed between this defendant and any other director or stockholder.

As they have reference to this defendant the allegations of Paragraph 5 of the bill of complaint with respect to such combination and control are without foundation in fact and are untrue and are denied.

6.

Complainant, Charles A. Burckhardt, became a stockholder of defendant Bank on July 29, 1918, by the acquisition of 250 shares.

The allegations of Paragraph 6 of the bill of complaint to the effect that representations were made to induce complainant to acquire stock in defendant Bank are not pertinent or material to any issue herein. If an answer thereto be required, this defendant says that he did not solicit complainant to acquire stock in defendant Bank, or make any representation to complainant, of the kind alleged, or otherwise, to induce him to become a stockholder.

7.

The directors of defendant Bank, including this defendant, took the oath of office prescribed by law before entering upon the performance of their duties as such directors; and this defendant says that he has in no manner violated said oath of office but on the contrary he has faithfully and honestly

assumed and performed the duties and obligations of his office as such director. [90]

8.

It is not the fact that Henry L. Pittock in his lifetime or the trustees of his estate after his death, or any other persons or interests identified with them, dominated or controlled defendant Bank from its organization down to March 29, 1927, or at any time. No such combination for control ever existed, as this defendant has pointed out in his answer to Paragraph 5 of the bill of complaint. Henry L. Pittock in his lifetime, and the trustees of his estate after his death, at no time have exercised or attempted to exercise in or about the affairs of defendant Bank any other or greater rights than those lawfully vested in them as owners of stock of defendant Bank. This defendant avers that during all the time he was a director of the defendant Bank that he was independent of the domination or control of any person, persons, or corporation, and that at all of such times he acted individually as he deemed to be for the best interests of the Bank and all of its stockholders.

9.

Increases of capital and surplus of defendant Bank were made in substantially the amounts and at about the times stated in Paragraph 9 of the bill of complaint. It is true also, although the fact is not pertinent or material to any issue herein, that at the time the capital was increased to $2,000,000 in 1922, the stockholders of defendant Bank, in

order to strengthen its position and to offset inevitable and unavoidable losses due to the sudden deflation of values following the termination of the World War, also voluntarily paid in the sum of $500,000, *$350.00* of which was credited to the earnings account, the remainder, $150,000, going to surplus, thereby increasing the surplus account from $250,000 to $400,000.

10.

This defendant is unable to determine the nature of the charge made against the defendants in Paragraph 10 of the bill of complaint. He denies specifically that he in any manner or to any extent whatsoever, [91] caused, required, or directed to be lost the sums listed in said paragraph or any sum, or any assets of said Bank.

Each of the persons and corporations listed in said Paragraph is indebted to defendant Bank and in some instances a portion of such indebtedness has been charged to profit and loss. But in each case, excepting the case of McCormick Lumber Co., the indebtedness is the result of inability on the part of the borrowers to repay when due loans made in the ordinary course of business at times and under circumstances such that this individual defendant was in no manner at fault in the extension of credit. In large part these loans were made prior to the year 1920, to borrowers then financially responsible and in most instances supported by collateral entirely adequate at the time in value, and the inability of the borrowers to repay the loans

when due resulted from the sudden and unexpected drop in merchandise and other values following the cessation of the World War. Since that time the officers of defendant Bank have been active and diligent in their effort to collect said loans and substantial recoveries have been made and are still being made thereon.

All loans made by defendant Bank to McCormick Lumber Company have been paid in full. The indebtedness now owing by said Lumber Company is the result of the acceptance by defendant Bank for credit to the account of the McCormick Lumber Company of certain checks and drafts, payment of which was later refused by the drawers. The acceptance of these checks and drafts for immediate credit was without the knowledge of this defendant and he had no notice thereof or opportunity whatever of preventing such crediting of either checks or drafts, and he is in no respect chargeable with negligence or fault in respect thereto.

It is not the fact that this defendant in 1925 or at any time failed, neglected or refused to comply with any direction from any Bank Examiner or other representative of the Comptroller of the Currency to reduce the line of credit granted to J. E. Wheeler or to [92] any companies in which he was interested. All present indebtedness due from said Wheeler, Wheeler Timber Comapny, Wheeler Estate, and Telegram Publishing Company, is the result of loans made several years prior to 1925 upon a sufficient showing of financial worth and supported in large party by adequate guar-

anties and/or collateral. Renewals of said loans were made from time to time when the borrowers were unable to pay at maturity, but it is not true that the Examiner of National Banks requested the so-called Wheeler lines to be reduced because too much was loaned to one person, and such renewals were never granted in disobedience to any direction or against the advise of any Bank Examiner or other representative of the Comptroller of the Currency.

Further answering Paragraph 10 of the bill of complaint this defendant says that the loans made to the persons and corporations listed in paragraph 10 of the bill of complaint resulted from extensions of credit granted to said borrowers prior to the year 1923. At each annual meeting of the stockholders of defendant Bank from the year 1919 down to and including the year 1927, with the exception of the year 1924, complainant was represented in person or by proxy, and at each of such annual meetings reports showing the acts of the directors for the years preceding the respective annual meetings were placed before the meeting and resolutions duly and regularly adopted ratifying and approving the acts of the directors in such preceding years respectively. At the annual meeting for the year 1920, held January 30, in that year, complainant attended in person and personally offered the resolution which was thereupon adopted approving the acts of the directors in the preceding year. Complainant therefore should be and is estopped from making any complaint of the actions of this

defendant, who was a director, in extending credit to the persons and corporations listed in Paragraph 10 of the bill of complaint, and should be and is estopped from averring or proving the same.

Further answering Paragraph 10 of the bill of complaint, defendant [93] says, that he became a director of defendant Bank on the 13th day of January, 1920. If complainant's bill is intended as a charge that losses were made in the amounts stated in Paragraph 10 because of improper loans, this defendant says that he was not a director of the defendant Bank when the loans were made and the losses resulting therefrom, if any, accrued before he assumed office; and since his assumption of office no act or omission on his part or on the part of any the directors has increased or affected the amount of loss, if any, attributable to such loans.

11.

The allegations of Paragraph 11 of the bill of complaint are untrue and are denied. Defendant Charles A. Morden was elected a director of defendant Bank on January 11, 1921, and served as such director until August 31, 1922, when he resigned, having sold his stock for a valuable consideration to the defendant Mark Skinner. Defendant Morden served as a member of the Examining Committee from the time of his election as a director until the end of the year 1921 only. The defendant Spaulding was elected and became a member of the Examining Committee on the —— day of ——, 1923. During this period the Examining Committee made regular reports to the directors

and such reports were regularly spread upon the minutes of the meetings of the board of directors. But it is not the fact that said reports or any of them, showed any conidtion of wrong administration or impending losses or any condition in the affairs of the defendant Bank requiring action by the directors to avoid loss. During this period and at all times the directors met regularly and carefully reviewed the reports of the Examining Committee and took such action in respect thereto as in the exercise of sound judgment seemed necessary. No reports were suppressed and nothing in the condition of the Bank was ever kept from the stockholders, and it is untrue that the defendant Morden resigned as director because of any such undisclosed condition [94] in the affairs of the Bank.

It is not true that at any time during the existence of the defendant Bank its Examining Committee made any report which would show a favorable but incorrect condition of the Bank or any report which showed any condition of said Bank except the true condition thereof as said Examining Committee found and believed to exist and attempted to disclose by its reports. All reports of the Examining Committee were made to the board or directors of the Bank only and were thereupon placed with the minutes of the meetings of the directors, at which said reports were received, and thereupon all of said reports became available for examination by all of the stockholders of the Bank and by the District Bank Examiner and any other representa-

tive of the Comptroller of the Currency. All reports of the Examining Committee remained at all times and now remain in the minutes of the directors' meetings and were in fact read and their contents known to and understood by the District Bank Examiner, and could have been read and their contents known to and understood by any stockholder of the Bank or any representative of the Comptroller of the Currency.

It is untrue that the Examining Committee ever made a confidential, private or secret report, or any report, to Mark Skinner, vice-president, or to other officers or directors of the Bank, or to the directors of said Bank, which showed any condition different from that disclosed by any report made to the District Bank Examiner, or to the Comptroller of the Currency, but whether the Comptroller of the Currency in person received copies of all reports made by the Examining Committee to the board of directors, defendant cannot say, although he avers that copies of such reports of the Examining Committee were sent to the Comptroller of the Currency whenever requested. [95]

12.

This defendant is unable to determine what is attempted to be alleged in Paragraph 12 of the bill of complaint. Pursuant to the requirements of the by-laws of defendant Bank there was at all times an executive committee consisting of a majority of the board of directors, which committee met weekly and passed on applications for credit and kept fully

informed in regard to the purchase and sales of securities, loans on collateral, discounts and other business activities of defendant Bank. Regular monthly meetings of the board of directors were held at which the minutes of meetings of the executive committee were regularly read and submitted for approval.

There was also maintained at all times, in accordance with the by-laws of defendant Bank, an Examining Committee whose duty it was to investigate the affairs and business of defendant Bank twice in each year, and said committee during all of said times carefully investigated the affairs of defendant Bank and reported the results of such investigations to the board of directors; and this defendant alleges that throughout the period mentioned in the complaint every effort was made by him with respect to all matters coming within the scope of his office or duty as a director to supervise and manage the affairs and business of defendant Bank faithfully and honestly.

On October 22, 1926, the Chief National Bank Examiner of the Twelfth Federal Reserve District advised defendant Bank by letter of the result of an examination of its assets and stated that it would be necessary to provide additional funds to the amount of not less than $1,000,000 in order that nonproducing assets in this total could be eliminated. Thereafter this defendant, with other defendants, acting with the approval of said Bank Examiner, undertook the organization of a corporation capitalized at $1,500,000, one-half thereof to be

provided [96] by the stockholders of defendant Bank, each stockholder subscribing $37.50 for each share of bank stock held by him, said new corporation to purchase and take over from defendant Bank nonproducing or "frozen" assets, as described in the report of said Bank Examiner. Such acting defendants made every effort to consummate said plan but were unable to do so. But thereafter, following a further examination by said Bank Examiner, it was determined that it was necessary to levy a full 100% assessment upon the stockholders of defendant Bank, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000, and in addition guaranteed the payment of an additional sum of $1,000,000, in order to insure payment to the Bank of the full amount to accrue from said 100% assessment.

The allegation that acts or omissions of this defendant, as a director or otherwise, caused the defendant Bank to go into liquidation is untrue.

Except as hereinabove in this answer to Paragraph 12 admitted, this defendant specifically denies each and every allegation of said Paragraph 12.

13.

It is not the fact that at any time this defendant suppressed or concealed from stockholders any in-

formation regarding the condition of the Bank, and it is not true that stockholders' meetings were in any respect manipulated or controlled by this defendant or any person in combination with him. No such combination among stockholders as alleged in Paragraph 13 of the bill existed, and during the entire history of defendant Bank the rights of minority stockholders in the administration of its affairs were never in any degree impaired or restricted. [97]

14.

The allegations of Paragraph 14 of the bill of complaint are untrue. This defendant did not participate in any way in the acquisition of stock in defendant Bank by J. E. Wheeler, or aid him in any particular in securing credit for, or in the financing of his purchase of said stock. On the contrary, said purchase by J. E. Wheeler of stock theretofore owned by Guy M. Standifer, L. B. Menefee and R. V. Jones was consummated without the knowledge or consent of this defendant.

15.

The allegations of Paragraph 15 of the bill of complaint are untrue. This defendant was fully aware in 1925 and 1926 of the extent to which the assets of defendant Bank were nonproductive or frozen, and at all times during said years, and during the preceding years, had striven faithfully and honestly to convert said frozen assets into bankable productive commercial paper.

In June, 1926, a committee appointed by the di-

rectors, consisting of defendants Price, Metschan and Stewart, conferred with the Comptroller of the Currency and requested him to have an examination made of the condition of the Bank so that with the approval of the Comptroller, or his representative, steps could be taken for the elimination of all nonproductive or frozen assets. Thereafter such an examiation was made and other conferences were held with the Chief Bank Examiner of the Twelfth Federal Reserve District and the Comptroller, and thereafter and in December, 1926, with the approval of the Chief Bank Examiner and the Comptroller, defendant Bank and its directors determined to organize a corporation with a capital of $1,500,000, one-half thereof to be provided by the stockholders of defendant Bank, each stockholder subscribing $37.50 for each share of bank stock held by him, said new corporation [98] to purchase and take over from defendant Bank nonproducing or frozen assets as designated in the reports of the Chief Bank Examiner.

This defendant and other defendants made every effort to consummate said plan but were unable to do so; and when it was ascertained that said plan could not be successfully carried through, it was determined to be necessary to levy a full 100% assessment upon the stockholders of defendant Bank, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7,696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agree-

ment said stockholders advanced the sum of $1,000,000, and in addition guaranteed the payment of an additional sum of $1,000,000, in order to insure payment to the Bank of the full amount to accrue from said 100% assessment.

This defendant at no time failed or refused to comply with any direction or request of the Comptroller of the Currency. On the contrary, he at all times worked in co-operation with him, in the effort to formulate and carry out a plan for the elimination of all nonproducing or frozen assets.

It is not the fact that during 1926, or the year 1927, as alleged in paragraph 15 of the bill of complaint, any further loans were made or credit extended to J. E. Wheeler, either directly or upon his endorsement. On the contrary, this defendant for a long time prior thereto was endeavoring in every way within his power as director, to secure the retirement, in part at least, of the indebtedness owing by said J. E. Wheeler, and the companies in which he was interested.

No loans in excess of the amounts permitted by law were ever made by the board of directors of said Bank to J. E. Wheeler or to companies in which he was interested or to any other persons, [99] firms, or corporations.

16.

The allegations of Paragraph 16 of the bill of complaint are untrue. Defendant Bank was never in such a condition that it was unable to pay its depositors upon demand until on March 28, 1927, a

run upon the Bank occurred. Whereupon, defendant Bank, in order to insure full and immediate payment to all depositors on demand, entered into a contract with United States National Bank and First National Bank of Portland under the terms of which said two Banks agreed to advance and loan to defendant Bank all moneys necessary to enable defendant Bank to pay its depositors on demand, defendant Bank pledging to said two Banks all of its assets as collateral to said loan and in addition certain of its stockholders, including the Estate of Henry L. Pittock, individually guaranteeing repayment of said loan; and thereupon defendant Bank began liquidation of its assets in order to effect the payment of said loan to said two Banks.

Defendant O. L. Price was elected president of defendant Bank on March 1, 1927, but it is not the fact that thereafter the management of the Bank was left entirely to defendant Price, or that this defendant in any respect, or to any degree, delegated any of his duties as director to the president of the Bank, or to anyone else. And it is not true that in February, 1927, or in March, 1927, or at any other time, the directors, by the adoption of any plans or proposals before them, could have avoided the condition which made necessary in their judgment the agreement with United States National Bank and First National Bank of Portland and the liquidation as hereinabove described. As to the supposed plans or proposals referred to in Para-

graph 16 of the bill of complaint, this defendant says:

First. No plan for the reorganization of defendant Bank as a state bank and trust company was ever developed or [100] perfected so that it was possible of accomplishment. Such a plan was at one time suggested during the conferences with the Chief Bank Examiner hereinabove referred to, but it was rejected by defendant Bank and the Chief Bank Examiner in favor of the plan for transferring the frozen assets to a corporation to be organized with capital furnished by the stockholders of defendant Bank.

Second. So far as this defendant has ever been advised, J. E. Wheeler was never willing even to consider turning over his assets for the protection of defendant Bank, or for the benefit of his creditors, until long after the closing of defendant Bank. This defendant did not deter or in any way prevent or dissuade said Wheeler from any such transfer of assets, but, on the contrary, was at all times anxious and willing and often demanded that said Wheeler liquidate his property and assets in any way possible so that his indebtedness to defendant Bank might be paid.

Further answering Paragraph 16 of the bill of complaint, this defendant admits that the officers and directors of defendant Bank caused to be published on March 2, 1927, the announcement quoted on page 22 of the bill, but it is not true that the directors of the Bank left the sole management and control to defendant Price or in any manner abdicated

their responsibilities as directors. Nor is it true that the run on the Bank, which occurred almost four weeks later, was permitted by defendant Price or any of the then directors of the Bank, or that they refrained from doing everything in their power to prevent it.

The announcement so published on March 2, 1927, resulted from the fact that at that time the directors of defendant Bank having been unable to carry through the plan for the organization of a corporation to take over nonproducing or frozen assets, decided that with the consent and approval of the Chief Bank Examiner, an assessment of 100% upon the [101] capital stock of the Bank should be made, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7,696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000, and in addition guaranteed the payment of an additional sum of $1,000,000, in order to insure payment to defendant Bank of the full amount to accrue from said 100% assessment.

17.

It is not the fact that any secret or undisclosed agreements have been made as alleged in Paragraph 17 of the bill of complaint. The agreements said to have been placed in the custody of James B. Kerr are the agreements already referred to in this answer between defendant Bank and its guar-

anteeing stockholders on the one hand and the United States National Bank and the First National Bank of Portland on the other. Said agreements were not kept secret, but, on the contrary, were presented to and duly ratified at a meeeting of the stockholders of defendant Bank held May 3, 1927, and said agreements were thereupon spread upon the minutes of the stockholders' meeting of May 3, 1927.

18.

It is not the fact that the directors of defendant Bank made or caused losses to said Bank in two million dollars, or in any sum, nor is it the fact that the directors impaired the capital stock of the Bank or wilfully or intentionally depreciated or destroyed any investment in the stock of the Bank.

19.

It is not the fact that this defendant gave out or published improperly or carelessly or negligently or unlawfully, or at all, any information about the internal affairs of the Bank. [102] It is true that negotiations were had on one or more occasions for the sale and transfer to another bank of the assets, business, and goodwill of defendant Bank, and that the prospective purchaser was given such information about the properties offered for sale as was necessary to the negotiations. But the directors conducting such negotiations acted honestly and faithfully in the interest of defendant Bank and its stockholders, and at no time did they improperly disclose or make public the private affairs of the

Bank or give out any information which in any way worked to the disadvantage of the Bank.

20.

This defendant is ready and willing to disclose any and all facts in their possession which may be relevant or pertinent to any issue herein. But all books and records of defendant Bank are, and at all times have been, open to and available for inspection by the stockholders of defendant Bank, but none of said books or records is in the possession of this defendant.

21.

This defendant admits that defendant Bank is now claiming that complainant is indebted to defendant Bank. Except as thus admitted this defendant specifically denies each and every allegation of Paragraph 21 of the bill of complaint.

Complainant is indebted to defendant Bank in the sum of $30,000, with accrued and accruing interest. For a number of years prior to July 25, 1927, complainant was indebted to defendant Bank in the sum of $40,000, and on July 25, 1927, the indebtedness was reduced to $30,000 by the payment of $10,000 on account. Defendant Bank has made many demands upon complainant for the payment of this indebtedness but excepting for the payment of $10,000 so made on July 25, 1927, the principal of said loan has not been reduced but complainant has insisted upon renewals of his notes as they respectively matured. [103] In the report of the examination made by the Chief National Bank Ex-

aminer of the Twelfth Federal Reserve District on October 22, 1926, referred to hereinabove in the answer to Paragraph 12 of the bill of complaint, the indebtedness due defendant Bank from complainant was listed as a nonbankable item, and defendant Bank at that time, and before and after that time, constantly demanded of complainant that this indebtedness be paid. This defendant says that nothing in any of the matters attempted to be set out in complainant's bill justifies complainant's failure to pay his indebtedness to defendant Bank, but that defendant Bank should be permitted, notwithstanding complainant's demands herein, to enforce immediate payment by complainant of the principal and interest of his debt.

22.

The answer made by this defendant to Paragraph 21 of the bill of complaint sufficiently answers Paragraph 22 of the bill. No accounting of any kind is due complainant from defendant Bank or from this defendant, and complainant should not be permitted to use the demands or claims asserted in his bill as an excuse for withholding payment of his overdue obligation to defendant Bank.

23.

For his answer to Paragraph 23 of the bill of complaint this defendant says that the bill is without equity. This defendant and defendant Bank have not at any time refrained, and are not now refraining, from any necessary or proper step for the redress of any wrong done to defendant Bank,

but nothing in any of the matters attempted to be stated in the bill justifies the charge that this defendant has committed any wrong upon said Bank, and no stockholder, prior to the institution of this suit, has ever made any complaint to defendant [104] Bank, or its directors, of any such wrong, nor has any demand ever been made for the redress of any such supposed wrong.

This defendant denies that he now has or ever has controlled the affairs of the defendant Bank, and avers that at all times in his actions as a director and stockholder he has been faithful to the rights of the Bank and of the stockholders and creditors thereof.

WHEREFORE, this defendant, having fully answered the bill of complaint herein, prays that he be hence dismissed with costs and his disbursements herein taxed against complainant.

DEY, HAMPSON & NELSON,
Attorneys for Defendant Phil Metschan.
ALFRED A. HAMPSON,
Of Counsel. [105]

State of Oregon,
County of Multnomah,—ss.

I, Phil Metschan, make solemn oath and say: I am the defendant named in and who makes the foregoing answer; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

(Sgd.) PHIL METSCHAN.

Subscribed and sworn to before me this 19th day of December, 1927.

[Notarial Seal]

(Sgd.) ALFRED A. HAMPSON,
Notary Public for Oregon.

My commission expires August 22, 1928.

State of Oregon,
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 19th day of December, 1927, by receiving a copy thereof, duly certified to as such by Alfred A. Hampson of attorneys for defendant Phil Metschan.

W. C. BRISTOL,
Attorney for Plaintiff.

Filed December 19, 1927. [106]

AND AFTERWARDS, to wit, on the 19th day of December, 1927, there was duly filed in said court, an answer of defendant, Charles A. Morden, in words and figures as follows, to wit: [107]

[Title of Court and Cause.]

ANSWER OF DEFENDANT CHARLES A. MORDEN.

Now comes the defendant Charles A. Morden, and answering the bill of complaint herein says:

1.

This answering defendant admits that complainant, Charles A. Burckhardt is a citizen and resident of the State of Washington.

Defendant Chauncey McCormick is a resident and citizen of the State of Illinois.

Defendant The Northwestern National Bank is a national banking association organized under the banking laws of the United States and does business in the city of Portland, Oregon.

Defendants O. L. Price, A. D. Charlton, E. S. Collins, Natt McDougall, Phil Metschan, Frederick F. Pittock, Mark Skinner, Charles K. Spaulding, Charles H. Stewart and James F. Twohy are and for a number of years last past have been directors of defendant The Northwestern National Bank, and each was and is a citizen and resident of Oregon.

Defendant Charles A. Morden is a citizen and resident of Oregon and was at one time a director of defendant The Northwestern National [108] Bank.

It is true that defendants O. L. Price and Charles A. Morden are trustees under the last will and testament of Henry L. Pittock, deceased, and that defendant Charles A. Morden is an officer of the Oregonian Publishing Company, a corporation, but this defendant avers that neither of said facts is in any respect pertinent or material to any issue herein. This defendant believes that the reference to said facts in complainant's bill is for some ulterior purpose and constitutes impertinence.

Defendant Emery Olmstead was, prior to March 1, 1927, president and a director of said bank. On

that day he was succeeded as such president by defendant O. L. Price, who theretofore had been chairman of the board of directors of defendant Bank.

2.

This defendant is unable to determine from the bill of complaint herein, what amount, if any, is involved in this suit; and he leaves complainant to his proof of the allegation that a sum in excess of $3,000.00 is involved.

3.

This defendant is unable to determine from the bill of complaint herein whether the banking statutes referred to in Paragraph 3 of the bill are, as there asserted, a part of and involved with the subject matter of this suit, and denies that the laws referred to in Paragraph 3 of the bill are a part of or involved in this suit.

4.

It is not the fact that any wrongs have been committed against the defendant Bank for which the defendants who are and were directors have at any time been unwilling to seek redress. On the contrary, the defendants who are or were directors, and each of them, at all times have been ready and willing, and are now ready and willing to sue and [109] to call to account any and all persons or parties in any manner responsible for wrongs to defendant Bank.

It is not the fact that before the filing of the bill of complainant herein any demand was made upon

defendant Bank or upon the individual defendants as its directors, to correct or right the matters referred to as wrongs in the bill of complaint; on the contrary, neither complainant, nor any other stockholder of defendant Bank has at any time made any complaint, charge, or statement to defendant Bank or any of its directors, that any such alleged wrongs had been suffered; nor has complainant or any other stockholder ever demanded or requested that any step of any kind be taken to redress such supposed wrongs or to enforce any duties or liabilities of the individual defendants as directors of defendant Bank or otherwise.

Complainant is, and for a number of years last past has been, a stockholder of defendant Bank, but this defendant avers that complainant has at all times enjoyed each and all of the rights vested in him as stockholder. The allegations that the individual defendants through majority control of stock were or are adverse or antagonistic to complainant, or any other stockholder, or were or are attempting through such control to carry out a plan to injure defendant Bank and its minority stockholders, and each and all of the statements and insinuations of the last subparagraph of Paragraph 4 of the bill of complaint, are without any foundation in fact and are untrue and are denied.

5.

This defendant denies that at any time in the entire history of defendant Bank there ever existed any such combination between the individual defendants for the control of the stock of defendant

Bank as is alleged in Paragraph 5 of the bill of complaint, or otherwise or at all. It is true that the Estate of Henry L. Pittock, of which [110] defendants O. L. Price and Charles A. Morden are trustees, is and for several years last past has been the owner of 7,696 shares out of the total 20,000 shares of stock outstanding, and that defendant O. L. Price individually owns 290 shares and that other individuals and corporations own and hold shares of stock substantially to the number stated in Paragraph 5 of the bill of complaint, except that defendant Charles A. Morden has not been the owner of any shares of stock in defendant Bank since the year 1922. But no combination or confederation for the domination through control of a majority of the stock of defendant Bank has ever existed between this defendant and any other director or stockholder.

As they have reference to this defendant the allegations of Paragraph 5 of the bill of complaint with respect to such combination and control are without foundation in fact and are untrue and are denied.

6.

Complainant, Charles A. Burckhardt, became a stockholder of defendant Bank on July 29, 1918, by the acquisition of 250 shares.

The allegations of Paragraph 6 of the bill of complaint to the effect that representations were made to induce complainant to acquire stock in defendant Bank are not pertinent or material to any issue herein. If an answer thereto be required, this defendant says that he did not solicit complain-

ant to acquire stock in defendant Bank, or make any representation to complainant, of the kind alleged, or otherwise, to induce him to become a stockholder.

7.

The directors of defendant Bank, including this defendant, took the oath of office prescribed by law before entering upon the performance of their duties as such directors; and this defendant says that he has in no manner violated said oath of office but on the contrary he has faithfully and honestly assumed and performed the duties and obligations of his office as such director. [111]

8.

It is not the fact that Henry L. Pittock in his lifetime or the trustees of his estate after his death, or any other persons or interests identified with them, dominated or controlled defendant Bank from its organization down to March 29, 1927, or at any time. No such combination for control ever existed, as this defendant has pointed out in his answer to Paragraph 5 of the bill of complaint. Henry L. Pittock in his lifetime, and the trustees of his estate after his death, at no time have exercised or attempted to exercise in or about the affairs of defendant Bank any other or greater rights than those lawfully vested in them as owners of stock of defendant Bank. This defendant avers that during all the time he was a director of the defendant Bank that he was independent of the domination or control of any person, persons, or corporation, and that at all of such times he acted individually as he

deemed to be for the best interests of the Bank and all of its stockholders.

9.

Increases of capital and surplus of defendant Bank were made in substantially the amounts and at about the times stated in Paragraph 9 of the bill of complaint. It is true also, although the fact is not pertinent or material to any issue herein, that at the time the capital was increased to $2,000,000 in 1922, the stockholders of defendant Bank, in order to strengthen its position and to offset inevitable and unavoidable losses due to the sudden deflation of values following the termination of the World War, also voluntarily paid in the sum of $500,000, *$350.00* of which was credited to the earnings account, the remainder, $150,000, going to surplus, thereby increasing the surplus account from $250,000 to $400,000.

10.

This defendant is unable to determine the nature of the charge made against the defendants in Paragraph 10 of the bill of complaint. He denies specifically that he in any manner or to any extent whatsoever, [112] caused, required, or directed to be lost the sums listed in said paragraph or any sum, or any assets of said Bank.

Each of the persons and corporations listed in said Paragraph is indebted to defendant Bank and in some instances a portion of such indebtedness has been charged to profit and loss. But in each case, excepting the case of McCormick Lumber Co., the indebtedness is the result of inability on the part of

the borrowers to repay when due loans made in the ordinary course of business at times and under circumstances such that this individual defendant was in no manner at fault in the extension of credit. In large part these loans were made prior to the year 1920, to borrowers then financially responsible and in most instances supported by collateral entirely adequate at the time in value, and the inability of the borrowers to repay the loans when due resulted from the sudden and unexpected drop in merchandise and other values following the cessation of the World War. Since that time the officers of defendant Bank have been active and diligent in their efforts to collect said loans and substantial recoveries have been made and are still being made thereon.

All loans made by defendant Bank to McCormick Lumber Company have been paid in full. The indebtedness now owing by said Lumber Company is the result of the acceptance by defendant Bank for credit to the account of the McCormick Lumber Company of certain checks and drafts, payment of which was later refused by the drawers. The acceptance of these checks and drafts for immediate credit was without the knowledge of this defendant and he had no notice thereof or opportunity whatever of preventing such crediting of either checks or drafts, and he is in no respect chargeable with negligence or fault in respect thereto.

It is not the fact that this defendant in 1925 or at any time failed, neglected or refused to comply with any direction from any Bank Examiner or other representative of the Comptroller of the

Currency to reduce the line of credit granted to J. E. Wheeler or to [113] any companies in which he was interested. All present indebtedness due from said Wheeler, Wheeler Timber Company, Wheeler Estate, and Telegram Publishing Company, is the result of loans made several years prior to 1925 upon a sufficient showing of financial worth and supported in large party by adequate guaranties and/or collateral. Renewals of said loans were made from time to time when the borrowers were unable to pay at maturity, but it is not true that the Examiner of National Banks requested the so-called Wheeler lines to be reduced because too much was loaned to one person, and such renewals were never granted in disobedience to any direction or against the advice of any Bank Examiner or other representative of the Comptroller of the Currency.

Further answering Paragraph 10 of the bill of complaint this defendant says that the loans made to the persons and corporations listed in Paragraph 10 of the bill of complaint resulted from extensions of credit granted to said borrowers prior to the year 1923. At each annual meeting of the stockholders of defendant Bank from the year 1919 down to and including the year 1927, with the exception of the year 1924, complainant was represented in person or by proxy, and at each of such annual meetings reports showing the acts of the directors for the years preceding the respective annual meetings were placed before the meeting and resolutions duly and regularly adopted ratifying and approving the acts

of the directors in such preceding years respectively. At the annual meeting for the year 1920, held January 30, in that year, complainant attended in person and personally offered the resolution which was thereupon adopted approving the acts of the directors in the preceding year. Complainant therefore should be and is estopped from making any complaint of the actions of this defendant, who was a director, in extending credit to the persons and corporations listed in Paragraph 10 of the bill of complaint, and should be and is estopped from averring or proving the same.

Further answering Paragraph 10 of the bill of complaint, defendant [114] says, that he became a director of defendant Bank on the —— day of ——, 19——. If complainant's bill is intended as a charge that losses were made in the amounts stated in Paragraph 10 because of improper loans, this defendant says that he was not a director of the defendant Bank when the loans were made and the losses resulting therefrom, if any, accrued before he assumed office; and since his assumption of office no act or omission on his part or on the part of any the directors has increased or affected the amount of loss, if any, attributable to such loans.

11.

The allegations of Paragraph 11 of the bill of complaint are untrue and are denied. Defendant Charles A. Morden was elected a director of defendant Bank on January 11, 1921, and served as such director until August 31, 1922, when he resigned, having sold his stock for a valuable consideration to

the defendant Mark Skinner. Defendant Morden served as a member of the Examiner Committee from the time of his election as a director until the end of the year 1921 only. The defendant Spaulding was elected and became a member of the Examining Committee on the —— day of ——, 1923. During this period the Examining Committee made regular reports to the directors and such reports were regularly spread upon the minutes of the meetings of the board of directors. But it is not the fact that said reports, or any of them, showed any condition of wrong administration or impending losses or any condition in the affairs of the defendant Bank requiring action by the directors to avoid loss. During this period and at all times the directors met regularly and carefully reviewed the reports of the Examining Committee and took such action in respect thereto as in the exercise of sound judgment seemed necessary. No reports were suppressed and nothing in the condition of the Bank was ever kept from the stockholders, and it is untrue that the defendant Morden resigned as director because of any such undisclosed condition [115] in the affairs of the Bank.

It is not true that at any time during the existence of the defendant Bank its Examining Committee made any report which would show a favorable but incorrect condition of the Bank or any report which showed any condition of said Bank except the true condition thereof as said Examining Committee found and believed to exist and attempted to disclose by its reports. All reports of the Examining Committee were made to the board of directors

of the Bank only and were thereupon placed with the minutes of the meetings of the directors, at which said reports were received, and thereupon all of said reports become available for examination by all of the stockholders of the Bank and by the District Bank Examiner and any other representative of the Comptroller of the Currency. All reports of the Examining Committee remained at all times and now remain in the minutes of the directors' meetings and were in fact read and their contents known to and understood by the District Bank Examiner, and could have been read and their contents known to and understood by any stockholder of the Bank or any representative of the Comptroller of the Currency.

It is untrue that the Examining Committee ever made a confidential, private or secret report, or any report, to Mark Skinner, vice-president, or to other officers or directors of the Bank, or to the directors of said Bank, which showed any condition different from that disclosed by any report made to the District Bank Examiner, or to the Comptroller of the Currency, but whether the Comptroller of the Currency in person received copies of al reports made by the Examining Committee to the board of directors, defendant cannot say, although he avers that copies of such reports of the Examining Committee were sent to the Comptroller of the Currency whenever requested. [116]

12.

This defendant is unable to determine what is attempted to be alleged in Paragraph 12 of the bill

of complaint. Pursuant to the requirements of the by-laws of defendant Bank there was at all times an executive committee consisting of a majority of the board of directors, which committee met weekly and passed on applications for credit and kept fully informed in regard to the purchase and sales of securities, loans on collateral, discounts and other business activities of defendant Bank. Regular monthly meetings of the board of directors were held at which the minutes of meetings of the executive committee were regularly read and submitted for approval.

There was also maintained at all times, in accordance with the by-laws of defendant Bank, an Examining Committee whose duty it was to investigate the affairs and business of defendant Bank twice in each year, and said committee during all of said times carefully investigated the affairs of defendant Bank and reported the results of such investigations to the board of directors; and this defendant alleges that throughout the period mentioned in the complaint every effort was made by him with respect to all matters coming within the scope of his office or duty as a director to supervise and manage the affairs and business of defendant Bank faithfully and honestly.

On October 22, 1926, the Chief National Bank Examiner of the Twelfth Federal Reserve District advised defendant Bank by letter of the result of an examination of its assets and stated that it would be necessary to provide additional funds to the amount of not less than $1,000,000 in order that

nonproducing assets in this total could be eliminated. Thereafter this defendant, with other defendants, acting with the approval of said Bank Examiner, undertook the organization of a corporation capitalized at $1,500,000, one-half thereof to be provided [117] by the stockholders of defendant Bank, each stockholder subscribing $37.50 for each share of bank stock held by him, said new corporation to purchase and take over from defendant Bank nonproducing or "frozen" assets, as described in the report of said Bank Examiner. Such acting defendants made every effort to consummate said plan but were unable to do so. But thereafter, following a further examination by said Bank Examiner, it was determined that it was necessary to levy a full 100% assessment upon the stockholders of defendant Bank, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000, and in addition guaranteed the payment of an additional sum of $1,000,000, in order to insure payment to the Bank of the full amount to accrue from said 100% assessment.

The allegation that acts or omissions of this defendant, as a director or otherwise, caused the defendant Bank to go into liquidation is untrue.

Except as hereinabove in this answer to Paragraph 12 admitted, this defendant specifically denies each and every allegation of said Paragraph 12.

13.

It is not the fact that at any time this defendant suppressed or concealed from stockholders any information regarding the condition of the Bank, and it is not true that stockholders meetings were in any respect manipulated or controlled by this defendant or any person in combination with him. No such combination among stockholders as alleged in Paragraph 13 of the bill existed, and during the entire history of defendant Bank the rights of minority stockholders in the administration of its affairs were never in any degree impaired or restricted. [118]

14.

The allegations of Paragraph 14 of the bill of complaint are untrue. This defendant did not participate in any way in the acquisition of stock in defendant Bank by J. E. Wheeler, or aid him in any particular in securing credit for, or in the financing of his purchase of said stock. On the contrary, said purchase by J. E. Wheeler of stock theretofore owned by Guy M. Standifer, L. B. Menefee and R. V. Jones was consummated without the knowledge or consent of this defendant.

15.

The allegations of Paragraph 15 of the bill of complaint are untrue. This defendant was fully aware in 1925 and 1926 of the extent to which the assets of defendant Bank were nonproductive or frozen, and at all times during said years, and during the preceding years, had striven faithfully and

honestly to convert said frozen assets into bankable productive commercial paper.

In June, 1926, a committee appointed by the directors, consisting of defendants Price, Metschan and Stewart, conferred with the Comptroller of the Currency and requested him to have an examination made of the condition of the Bank so that with the approval of the Comptroller, or his representative, steps could be taken for the elimination of all non-productive or frozen assets. Thereafter such an examination was made and other conferences were held with the Chief Bank Examiner of the Twelfth Federal Reserve District and the Comptroller, and thereafter and in December, 1926, with the approval of the Chief Bank Examiner and the Comptroller, defendant Bank and its directors determined to organize a corporation with a capital of $1,500,000, one-half thereof to be provided by the stockholders of defendant Bank, each stockholder subscribing $37.50 for each share of bank stock held by him, said new corporation [119] to purchase and take over from defendant Bank non-producing or frozen assets as designated in the reports of the Chief Bank Examiner.

This defendant and other defendants made every effort to consummate said plan but were unable to do so; and when it was ascertained that said plan could not be successfully carried through, it was determined to be necessary to levy a full 100% assessment upon the stockholders of defendant Bank, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7696 shares,

undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000, and in addition guaranteed the payment of an additional sum of $1,000,000, in order to insure payment to the Bank of the full amount to accrue from said 100% assessment.

This defendant at no time failed or refused to comply with any direction or request of the Comptroller of the Currency. On the contrary, he at all times worked in co-operation with him, in the effort to formulate and carry out a plan for the elimination of all nonproducing or frozen assets.

It is not the fact that during 1926, or the year 1927, as alleged in Paragraph 15 of the bill of complaint, any further loans were made or credit extended to J. E. Wheeler, either directly or upon his endorsement. On the contrary, this defendant for a long time prior thereto was endeavoring in every way within his power as director, to secure the retirement, in part at least, of the indebtedness owing by said J. E. Wheeler, and the companies in which he was interested.

No loans in excess of the amounts permitted by law were ever made by the board of directors of said Bank to J. E. Wheeler or to companies in which he was interested or to any other persons, [120] firms, or corporations.

16.

The allegations of Paragraph 16 of the bill of complaint are untrue. Defendant Bank was never

in such a condition that it was unable to pay its depositors upon demand until March 28, 1927, a run upon the Bank occurred. Whereupon, defendant Bank, in order to insure full and immediate payment to all depositors on demand, entered into a contract with United States National Bank and First National Bank of Portland under the terms of which said two Banks agreed to advance and loan to defendant Bank all moneys necessary to enable defendant Bank to pay its depositors on demand, defendant Bank pledging to said two Banks all of its assets as collateral to said loan and in addition certain of its stockholders, including the Estate of Henry L. Pittock, individually guaranteeing repayment of said loan; and thereupon defendant Bank began liquidation of its assets in order to effect the payment of said loan to said two Banks.

Defendant O. L. Price was elected president of defendant Bank on March 1, 1927, but it is not the fact that thereafter the management of the Bank was left entirely to defendant Price, or that this defendant in any respect, or to any degree, delegated any of his duties as director to the president of the Bank, or to anyone else. And it is not true that in February, 1927, or in March, 1927, or at any other time, the directors, by the adoption of any plans or proposals before them, could have avoided the condition which made necessary in their judgment the agreement with United States National Bank and First National Bank of Portland and the liquidation as hereinabove described. As to the supposed

plans or proposals referred to in Paragraph 16 of the bill of complaint, this defendant says:

First. No plan for the reorganization of defendant Bank as a state bank and trust company was ever developed or [121] perfected so that it was possible for accomplishment. Such a plan was at one time suggested during the conferences with the Chief Bank Examiner hereinabove referred to, but it was rejected by defendant Bank and the Chief Bank Examiner in favor of the plan for transferring the frozen assets to a corporation to be organized with capital furnished by the stockholders of defendant Bank.

Second. So far as this defendant has ever been advised, J. E. Wheeler was never willing even to consider turning over his assets for the protection of defendant Bank, or for the benefit of his creditors, until long after the closing of defendant Bank. This defendant did not deter or in any way prevent or dissuade said Wheeler from any such transfer of assets, but, on the contrary, was at all times anxious and willing and often demanded that said Wheeler liquidate his property and assets in any way possible so that his indebtedness to defendant Bank might be paid.

Further answering Paragraph 16 of the bill of complaint, this defendant admits that the officers and directors of defendant Bank caused to be published on March 2, 1927, the announcement quoted on page 22 of the bill, but it is not true that the directors of the Bank left the sole management and control to defendant Price or in any manner ab-

dicated their responsibilities as directors. Nor is it true that the run on the Bank, which occurred almost four weeks later, was permitted by defendant Price or any of the then directors of the Bank, or that they refrained from doing everything in their power to prevent it.

The announcement so published on March 2, 1927, resulted from the fact that at that time the directors of defendant Bank having been unable to carry through the plan for the organization of a corporation to take over nonproducing or frozen assets, decided that with the consent and approval of the Chief Bank Examiner, an assessment of 100% upon the [122] capital stock of the Bank should be made, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7,696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000, and in addition guaranteed the payment of an additional sum of $1,000,000, in order to insure payment to defendant Bank of the full amount to accrue from said 100% assessment.

17.

It is not the fact that any secret or undisclosed agreements have been made as alleged in Paragraph 17 of the bill of complaint. The agreements said to have been placed in the custody of James B. Kerr are the agreements already referred to in this answer between defendant Bank and its guaranteeing

stockholders on the one hand and the United States National Bank and the First National Bank of Portland on the other. Said agreements were not kept secret, but, on the contrary, were presented to and duly ratified at a meeting of the stockholders of defendant Bank held May 3, 1927, and said agreements were thereupon spread upon the minutes of the stockholders' meeting of May 3, 1927.

18.

It is not the fact that the directors of defendant Bank made or caused losses to said Bank in two million dollars, or in any sum, nor is it the fact that the directors impaired the capital stock of the Bank or wilfully or intentionally depreciated or destroyed any investment in the stock of the Bank.

19.

It is not the fact that this defendant gave out or published improperly or carelessly or negligently or unlawfully, or at all, any information about the internal affairs of the Bank. [123] It is true that negotiations were had on one or more occasions for the sale and transfer to another bank of the assets, business, and goodwill of defendant Bank, and that the prospective purchaser was given such information about the properties offered for sale as was necessary to the negotiations. But the directors conducting such negotiations acted honestly and faithfully in the interest of defendant Bank and its stockholders, and at no time did they improperly disclose or make public the private affairs

of the Bank or give out any information which in any way worked to the disadvantage of the Bank.

20.

This defendant is ready and willing to disclose any and all facts in their possession which may be relevant or pertinent to any issue herein. But all books and records of defendant Bank are, and at all times have been, open to and available for inspection by the stockholders of defendant Bank, but none of said books or records is in the possession of this defendant.

21.

This defendant admits that defendant Bank is now claiming that complainant is indebted to defendant Bank. Except as thus admitted this defendant specifically denies each and every allegation of Paragraph 21 of the bill of complaint.

Complainant is indebted to defendant Bank in the sum of $30,000, with accrued and accruing interest. For a number of years prior to July 25, 1927, complainant was indebted to defendant Bank in the sum of $40,000, and on July 25, 1927, the indebtedness was reduced to $30,000 by the payment of $10,000 on account. Defendant Bank has made many demands upon complainant for the payment of this indebtedness but excepting for the payment of $10,000 so made on July 25, 1927, the principal of said loan has not been reduced but complainant has insisted upon renewals of his notes as they respectively matured. [124] In the report of the examination made by the Chief National Bank Examiner of the Twelfth Federal Reserve District on

October 22, 1926, referred to hereinabove in the answer to Paragraph 12 of the bill of complaint, the indebtedness due defendant Bank from complainant was listed as a nonbankable item, and defendant Bank at that time, and before and after that time, constantly demanded of complainant that this indebtedness be paid. This defendant says that nothing in any of the matters attempted to be set out in complainant's bill justifies complainant's failure to pay his indebtedness to defendant Bank, but that defendant Bank should be permitted, notwithstanding complainant's demands herein, to enforce immediate payment by complainant of the principal and interest of his debt.

22.

The answer made by this defendant to Paragraph 21 of the bill of complaint sufficiently answers Paragraph 22 of the bill. No accounting of any kind is due complainant from defendant Bank or from this defendant, and complainant should not be permitted to use the demands or claims asserted in his bill as an excuse for withholding payment of his overdue obligation to defendant Bank.

23.

For his answer to Paragraph 23 of the bill of complaint this defendant says that the bill is without equity. This defendant and defendant Bank have not at any time refrained, and are not now refraining, from any necessary or proper step for the redress of any wrong done to defendant Bank, but nothing in any of the matters attempted to be stated in the bill justified the charge that this de-

fendant has committed any wrong upon said Bank, and no stockholder, prior to the institution of this suit, has ever made any complaint to defendant [125] Bank, or its directors, of any such wrong, nor has any demand ever been made for the redress of any such supposed wrong.

This defendant denies that he now has or ever has controlled the affairs of the defendant Bank, and avers that at all times in his actions as a director and stockholder he has been faithful to the rights of the Bank and of the stockholders and creditors thereof.

WHEREFORE, this defendant, having fully answered the bill of complaint herein, prays that he be hence dismissed with costs and his disbursements herein taxed against complainant.

D. P. PRICE and
JOHN F. LOGAN,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 19th day of December, 1927, by receiving a copy thereof, duly certified to as such by John Logan, attorney for defendant Charles A. Morden.

W. C. BRISTOL,
Attorney for Complainant.

Filed December 19, 1927. [126]

AND AFTERWARDS, to wit, on Tuesday, the 27th day of December, 1927, the same being the 37th judicial day of the regular November Term of said court,—Present the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [127]

[Title of Court and Cause.]

MINUTES OF COURT—DECEMBER 27, 1927—ORDER GRANTING MOTION OF DEFENDANT CHAUNCEY McCORMICK TO QUASH SERVICE OF SUBPOENA AND DISMISS SUIT AS TO HIM.

This proceeding came before the Court on December 19, 1927, upon motion of defendant Chauncey McCormick, appearing specially for the purpose of the motion only, to quash service of subpoena and to dismiss the suit as to him, said defendant appearing by Messrs. James B. Kerr and Charles A. Hart, his attorneys, and complainant appearing by William C. Bristol, Esq., his attorney; and it appearing from the record herein that said defendant Chauncey McCormick is a resident and inhabitant of the Northern District of Illinois, Eastern Division at Chicago, Illinois, and that complainant is a resident and inhabitant of the Western District of Washington, and that the said defendant Chauncey McCormick is not suable in [128] the District of Oregon wherein this suit is brought;

Therefore it is

ORDERED that the motion of defendant Chauncey McCormick be and the same is hereby allowed and that this suit be and the same is hereby dismissed as to defendant Chauncey McCormick.

Dated this 27th day of December, 1927.

R. S. BEAN,
District Judge.

Filed December 27, 1927. [129]

AND AFTERWARDS, to wit, on the 27th day of December, 1927, there was duly filed in said court an opinion, in words and figures as follows, to wit: [130]

In the District Court of the United States for the District of Oregon.

No. E.–8936.

CHARLES A. BURCKHARDT,
Complainant,

vs.

THE NORTHWESTERN NATIONAL BANK, CHARLES K. SPAULDING, etc.,
Respondents.

No. E.–8939

FRED A. BALLIN,

Complainant,

vs.

THE *NORTHWEST* NATIONAL BANK, CHARLES K. SPAULDING, etc.,

Respondents.

MINUTES OF COURT—DECEMBER 27, 1927 —OPINION.

Portland, Oregon, December 27, 1927.

Memorandum by BEAN, District Judge.—These suits are brought against the *Northwest* National Bank, formerly doing business here, and the directors thereof for an accounting of the transactions of the bank and its directors, and for a personal judgment against the directors if found to be liable. The plaintiffs are all nonresidents of the district. All the defendants except McCormick are residents of the district. McCormick is a resident of Illinois and was there served with process. He appears specially and moves to quash the service and dismiss the suits as to him on the ground that he is not suable in this district. His objection does not go to the jurisdiction of the court over the subject matter, but to its jurisdiction over him. In other words, the objection is to the venue.

Section 51 of the judicial code provides that except as in the six succeeding sections no civil suit shall be brought in any district court against any defendant by any legal process in any other district

than that of which he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of [131] different states the suit shall be brought in the district of the residence of either the plaintiff or the defendant. The six succeeding sections mentioned have reference to states containing more than one district, or districts containing more than one division, or where receivers are appointed of lands or other property of a fixed character, or suits to enforce legal or equitable liens upon or claims to, or to remove an encumbrance or cloud upon the title of real or personal property within the district in which the suit is brought.

These suits do not come within the provisions of either of these sections. They are not suits to enforce a lien upon real or personal property, or remove a cloud or encumbrance thereon, but are *in personam*. They are therefore governed by section 51. And if jurisdiction is asserted because a federal question is involved McCormick can be sued only in the district of which he is an inhabitant. (Rose's Federal Pro. 280; Macon Gro. vs. At. Coast Line, 215 U. S. 501.) If jurisdiction is founded on diversity of citizenship alone, he cannot be compelled to submit himself to the jurisdiction of this court in a suit brought by a nonresident, by service in the district of his residence. (Camp vs. Gress, 250 U. S. 308; Robertson vs. Labor Board, 268 U. S. 619.)

The motion is therefore allowed.

Filed December 27, 1927. [132]

AND AFTERWARDS, to wit, on the 9th day of January, 1928, there was duly filed in said court, an answer of defendant, Emery Olmstead, in words and figures as follows, to wit: [133]

[Title of Court and Cause.]

ANSWER OF RESPONDENT EMERY OLMSTEAD.

Now comes the respondent Emery Olmstead, and for answer to complainant's complaint admits, denies and alleges, as follows:

I.

Respondent says that it is true that Charles A. Burckhardt, complainant, is a resident and citizen of the State of Washington, and that Chauncey McCormick is a resident and citizen of the State of Illinois, and that The Northwestern National Bank is an association organized under the laws of the United States for carrying on the business of banking under and pursuant to the statutes, to wit, Section 5133, and other statutes of the kind and character mentioned in complainant's bill.

It is also true that O. L. Price, A. D. Charlton, E. S. Collins, Natt McDougall, Phil Metcham, Frederick F. Pittock, Mark Skinner, Charles K. Spaulding, Charles H. Stewart and James F. Twohy were and are the directors of the Northwestern National Bank, and that each of them is

a citizen and resident of the State of [134] Oregon.

It is also true that Charles A. Morden, together with O. L. Price are trustees of the H. L. Pittock estate, and that for part of the time mentioned in complainant's bill Charles A. Morden was a director of said Bank and was one of the members of the Examining Committee of said Bank.

It is also true that Emery Olmstead was president of the Northwestern National Bank from some time in 1919 until the last of February, 1927, and in this connection respondent says that on the 28th day of February, 1927, respondent resigned as president and director and the said O. L. Price succeeded him as president of said Bank; that since said time the respondent Emery Olmstead has had nothing whatever to do with The Northwestern National Bank, either as an official of said Bank, or otherwise.

II.

Respondent admits the allegations contained in Paragraphs 2 and 3 of complainant's complaint.

III.

Answering the allegations contained in Paragraph 4, this respondent says that it is not true that he at any time committed any act and/or acts for the purpose of injuring the stockholders, and in this connection respondent says that every act done or performed by him while he was a member of the board of directors, or while he was acting as president, was done for the purpose of benefiting the

Bank and enabling it to pay dividends to the stockholders.

In connection with the allegation in complainant's bill that demand was made upon the directors prior to the institution of this suit, this respondent says that he was not on the board [135] of directors at said time, and was not engaged in directing the affairs of the said Bank.

It is true that complainant is a holder of capital stock of The Northwestern National Bank, and it is true that the said Charles A. Burckhardt, complainant, was not a member of the board of directors at the time of the happening of the affairs delineated in said bill of complaint.

It is not true that this respondent ever at any time dominated or controlled the said Bank, nor is it true that this respondent at any time did anything to injure or destroy the value of the minority stockholders' stock.

Each and every other allegation contained in said paragraph, this respondent specifically denies.

IV.

Answering the allegations contained in Paragraph 5, your respondent says that Charles A. Morden, at one time director and member of the board of said Bank, and O. L. Price, as trustee of the H. L. Pittock estate, controlled seventy-six hundred and ninety-six (7696) shares of the capital stock of said Bank, and that, in addition thereto, O. L. Price personally holds and has under his control two hundred and ninety (290) shares, and that Frederick F. Pittock holds one hundred (100)

shares, and it is also true that Charles A. Morden individually held at one time fifty (50) shares, and that by reason of said holdings Price and Morden control or are in a position to control the said bank.

And in this connection your respondent alleges that in the year 1922, and while Charles A. Morden was one of the trustees of the H. L. Pittock estate and possessed of certain duties in relation to said trusteeship, the said Charles A. Morden sold his fifty (50) shares of stock and resigned as a director and as a [136] member of the Examining Committee; that in connection with his duties while acting on the Examining Committee, the said Charles A. Morden, prior to said time, had occasion to and did pass upon practically all of the loans mentioned in Paragraph 10 of complainant's bill; that by resigning from the Examining Committee and board of directors of The Northwestern National Bank, the said Charles A. Morden refused to perform his duties as required of him by law and under his trusteeship of the H. L. Pittock estate.

V.

Answering the allegations contained in Paragraph 6, your respondent says that it is not true that complainant was solicited by the board of directors of the said Bank to become a stockholder; that it is true that complainant was solicited by a member of the board of directors, to wit, Phil Metschan, and at said time the said complainant was invited to buy shares upon the representation that said Bank was paying dividends, and it is true that complainant paid the sum of thirty-one thousand

two hundred and fifty dollars ($31,250.00) for stock in the said Bank, and received certificate No. 98 for two hundred and fifty (250) shares of said stock; and in this connection respondent says that at the time said complainant purchased said stock, and for one year thereafter, the said Northwestern National Bank paid dividends, and that said representation in that respect was true.

VI.

Answering the allegations contained in Paragraph 7, this respondent says that it is true that the directors took the oath of office and agreed to conduct the affairs of said Bank in conformity with the law; and in this respect your respondent [137] says that, so far as he was able, he did conduct the said Bank in conformity with the rules and regulations and the law appertaining to National Banks, and that between the years of 1920 and 1926, inclusive, under the management of your respondent, The Northwestern National Bank made in profits a sum in excess of one million four hundred thousand dollars ($1,400,000.00); that because of the matters and things hereinafter set forth, to which reference is hereby made, the earnings were not used for the payment of dividends, but were used, because of the peculiar situation existing at said time, to take care of losses on what is commonly called "bad loans."

VII.

Answering the allegations contained on Paragraph 8, your respondent says that the H. L. Pit-

tock estate trustees, and those associated with them and identified with them, controlled and directed the affairs of The Northwestern National Bank in the selection and maintenance of the directors and officers of the said Bank.

VIII.

Answering the allegations contained in Paragraph 9, your respondent denies that the capital of said Bank was apparent, and states in this connection that the capital was real, and approximately as alleged in Paragraph 9 of complainant's bill.

IX.

Answering the allegations contained in Paragraph 10, your respondent says that at the time of the happening of the events and transactions narrated in Paragraph 10, or most of them, and particularly in 1918 and 1919 during the World War, your respondent [138] was actively engaged, by and with the knowledge, consent and appointment of the board of directors, in securing business for said Bank, making Eastern connections, and, during the World War, in raising money for the United States Government in that he had charge of all the Liberty Loan drives, including the Victory Loan, five in number, in the city of Portland, Oregon; that your respondent was also Chairman of the War Camp Community Service of the State of Oregon, and also chairman of the committee of fifteen for the development of the West channel of the river and Swan Island and Guild's Lake, a project involving a ten million dollar expendi-

ture; that your respondent during said times also caused to be organized the Columbia-Pacific Steamship Company, which was organized after the war, and which company was developed up to the point where it operated eleven boats running to the Orient out of the city of Portland; that these duties, together with numerous other duties, necessarily demanded of your respondent a great deal of time, and that, by reason of the numerous duties devolving upon your respondent he was not able to give personal attention to all of the loans made by the said Bank, and in order that your respondent might make the necessary connections in a financial way, secure new accounts, and build up the said Bank, there was appointed a number of vice-presidents of said Bank, which appointments were made by the board of directors of the said Bank, and at the same time the said board of directors placed the said vice-presidents in charge of certain loans, giving them full power to investigate the persons or bodies corporate applying for a loan prior to the making of the same; that said vice-presidents were required to report to the board of directors upon the safety of the said loans, and your respondent of necessity had to rely upon such investigations and sworn statements of the applicants for loans; that this method employed by your respondent, and directed by the [139] board of directors, was the usual, ordinary and customary method of handling loans made by banks of the kind and character of the Northwestern National Bank.

That in regard to Item 1, in Paragraph 10, your respondent says that the loan made to the Dufur Orchards Company was originally seventy thousand dollars ($70,000.00), and that said company owned large orchard tracts near Dufur, Oregon, and that your respondent opposed any further loans to the said Orchards Company; that thereupon a committee was appointed to examine into the affairs of said Orchards Company; that this committee visited the said tract and approved of a loan and/or loans in excess of six hundred thousand dollars ($600,000.00), in that they recommended that the Bank purchase three hundred thousand dollars ($300,000.00) of bonds that were in default upon the said property, and thereafter a majority of the board caused to be advanced to the said Orchards Company a total sum of six hundred thousand dollars ($600,000.00); that your respondent objected to this loan, but was overruled by a majority of the board, and your respondent was compelled to take more than three hundred thousand dollars ($300,000.00) out of the earnings of said Bank to charge the asset down to where he felt it was safe.

In regard to Item 2 of said Paragraph 10 your respondent says that this was a war loan approved by the board of directors; that it proved not to be good, and in this connection your respondent says that careful investigation was made of the financial standing and plans of the said A. O. Anderson, and that the said loan was made in good faith so far as your respondent is concerned, believing at

the time that the Bank was safe in making said loan; and in this connection your respondent says that he, while acting as president of said Bank, was successful in apprehending A. O. Anderson in the city of New York, and after suit brought in said courts collected [140] a sum in excess of sixty thousand dollars ($60,000.00), and that said sum mentioned in said complaint should be reduced by said amount.

In regard to Item three, your respondent says that he did not have charge of said loan to A. Rupert & Co.; that the same was handled by other officials of the Bank and after due investigation by them, and that he relied upon the investigation made by the other bank officials. Your respondent admits that said loan was a loss to said Bank.

In regard to Item 4, your respondent says that it is not true that he made this loan, but on the contrary avers that said loan was handled by a vice-president and said business was obtained by said vice-president, and said loan was based upon the statements made by said Bankers Discount Corporation and the investigation of said vice-president, and the same was made in the ordinary course of business so far as your respondent is concerned.

Your respondent says that all of the other items mentioned in said specifications, numbered from 6 to 16, inclusive, were made in approximately the same manner and after due investigation, and in this connection your respondent desires to state that the loan made to J. E. Wheeler was one made

after due investigation; that at the time said loan was made, or shortly thereafter, the said loan was amply secured; that there is now in possession of said Bank security protecting said loan of the reasonable value of a sum of money in excess of six hundred thousand dollars ($600,000.00); that The Northwestern National Bank had various and sundry guaranties of the said J. E. Wheeler, which guaranties in effect provided that J. E. Wheeler would pay not only his own direct obligations, but all of the obligations of any and all of his companies, including the McCormick Lumber Company, the Wheeler Timber Company, the W. E. Wheeler Estate, and the Telegram Publishing [141] Company, and in this connection your respondent alleges that the statement of J. E. Wheeler in February of 1925, showed assets as follows:

Accounts Receivable	$ 315,000.00
Notes Receivable	456,330.00
Timber stocks, bank stocks, etc.	4,400,000.00
50% The Portland Telegram	400,000.00
60% McCormick Lumber Company	600,000.00
¼ interest W. E. Wheeler estate,	1,000,000.00
Real Estate	102,000.00
	$7,273,330.00

and that said statement showed a net worth of more than six million dollars ($6,000,000.00); that in addition to the statement above delineated, The Northwestern National Bank had statements from the different companies in which J. E. Wheeler was interested showing their net worth, and that the

total net worth of all of the companies in which J. E. Wheeler was interested was in excess of eighteen million dollars ($18,000,000.00); that your respondent had made some independent investigation of the financial worth of J. E. Wheeler, particularly with regard to the value of his timber holdings, and your respondent had come to the conclusion that the said J. E. Wheeler under-estimated rather than over-estimated the value of his different holdings; that a recent statement of the holdings and interests of the said J. E. Wheeler shows that the said J. E. Wheeler, after all obligations of every kind and character are paid, has a net worth of four million six hundred ten thoussand dollars ($4,610,000.00).

That the loan to the McCormick Lumber Company, mentioned in Item 13, has been paid out of a bond issue placed against the property of the McCormick Lumber Company.

That the loan made to the Wheeler Timber Company and the loan made to the W. E. Wheeler Estate have the endorsements of J. E. Wheeler and W. M. Wheeler; that the same are safe loans, and will be paid in full out of the assets of J. E. Wheeler and/or [142] W. M. Wheeler.

That the loan made to the Telegram Publishing Company is endorsed by J. E. Wheeler and L. R. Wheeler, and that there are ample assets to pay said loan in full.

That the following is a personal statement of the interests, and the value of the same, including the liabilities, of J. E. Wheeler:

ASSETS:		
Timber Holdings		$6,102,000.00
Real Estate		75,000.00
Stock in McCormick Lumber Co.		81,000.00
Stock in Northwestern National Bank		705,000.00
Accounts Receivable due from McCormick Lumber Company,		1,572,000.00
Grand Total		$8,535,000.00
LIABILITIES:		
Personal	$1,278,400.00	
Telegram Publishing Co.	549,750.00	
Bowles judgment	70,000.00	
McCormick Lumber Co.	1,572,000.00	
Ralph Schneeloch Co.	60,500.00	
	3,530,650.00	
Law costs, liquidation and re-adjustment and unlisted liabilities	194,350.00	
Other liabilities	200,000.00	3,925,000.00
Surplus,		$4,610,000.00

That said statement shows that, after all of J. E. Wheeler's obligations have been paid, both contingent and otherwise, he still has for his own estate the sum of four million six hundred ten thousand dollars ($4,610,000.00); and that the District Examiner of Banks stated to your respondent that he was satisfied that J. E. Wheeler was in a stable financial condition during the years of 1926 and 1927.

Your respondent says that it is true that the Examiner of National Banks asked that Wheeler's lines be reduced, upon the [143] ground that there was too much loaned by said Bank to one person, and to this end your respondent consulted with J. E. Wheeler and L. R. Wheeler, the owners of the Telegram Publishing Company, and at said time, or thereabouts, your respondent succeeded in finding a purchaser, ready, willing and able to purchase the "Telegram" and its plant for the sum of nine hundred thousand dollars ($900,000.00) cash; that L. R. Wheeler signed a written option to sell the same; that J. E. Wheeler refused to sell the plant for such a price, and thereupon the said J. E. Wheeler consulted with the other members of the board of directors of The Northwestern National Bank, to wit, O. L. Price, Phil Metschan, E. S. Collins, A. D. Charlton and Charles K. Spauling, who were members of the Executive Committee, and notwithstanding the demands of the National Bank Examiner, and notwithstanding the request of your respondent that said "Telegram" be sold and said lines of credit be reduced, each and every member of said committee refused to allow or permit a sale of the said paper; that had said sale been made, the entire indebtedness of the Telegram Publishing Company would have been paid to said Bank, and some four hundred thousand dollars ($400,000.00) would have been available for the said J. E. Wheeler to pay other obligations of his said companies to the Bank at said time; that it was because of the failure of the directors above named to back

up the request of your respondent that your respondent was unable to reduce the lines of credit enjoyed by J. E. Wheeler and/or his companies.

That in order to comply with the said National Bank Examiner's request, your respondent also tried to negotiate the sale of various timber tracts owned by the said J. E. Wheeler, or in which he had an interest; that because of the lumber conditions then existing, it was difficult and almost impossible to make a sale of the said timber holdings in a short period of time; that [144] had the other members of the board of directors worked with your respondent, a sale of the "Telegram" would have been consummated, and the indebtedness of the said J. E. Wheeler and/or his companies would have been largely paid.

Your respondent further says that it is not true that the Bank was forced into liquidation by reason of said loans, and in this connection your respondent says that said loans were not public property and were not known generally to the public. Your respondent avers that the said Bank was forced into liquidation because of false and malicious rumors about its solvency; that in this connection your respondent says that false and malicious rumors were circulated in and about the City of Portland, causing an unprecedented run upon the said Bank; that during the first day alone of said run the said Bank paid out a sum of money in the approximate amount of three million dollars ($3,000,000.00) to depositors; that in nine months' time the said Northwestern National Bank has paid out to depositors

eighteen million three hundred thousand dollars ($18,300,000.00), and that all of said moneys came from the assets of the Bank, and not from any guaranties of any kind or character, and in this connection your respondent is informed and believes, and therefore alleges, that the depositors have been paid in full and that there will be available for the stockholders some two million five hundred thousand dollars ($2,500,000.00).

X.

Answering the allegations contained in Paragraph 11, your respondent says that so long as he was president of the said Bank, he kept the stockholders informed of the affairs of the said Bank, and did not suppress any information to which the said stockholders were entitled, nor did he suppress any information to which the directors were entitled. [145]

Your respondent says that it is true that Charles A. Morden resigned as director, and admits that Charles K. Spaulding succeeded him, and that thereafter Phil Metschan, Charles K. Spaulding and A. D. Charlton constituted the Examining Committee.

Your respondent says that it is true that the said Examining Committee made one report to the Comptroller of the Currency of the United States and a different report to Mark Skinner, vice-president, and that said report was different in that, among other things, it criticized certain loans or lines of credit, and did not reveal said criticisms to the Comptroller.

Your respondent denies each and every other allegation, specifically and generally, contained in said paragraph.

XI.

In regard to the allegations contained in Paragraph 12, your respondent denies all that portion of the same which has not been alleged or admitted heretofore, and states that he recommended that a new bank be organized, and that to this arrangement the said Bank Examiner agreed and all arrangements had been made to take out of said Bank the slow paper and frozen assets; that all of the stock in the new bank had been subscribed for, and all preliminary action had been taken by the board of directors with the exception of securing a charter for the said new bank; that all of said organization and preliminary matters had been agreed to by all of the members of the board of directors when, without notice or reason of any kind or character, O. L. Price, then controlling the said Northwestern National Bank by reason of his stock, announced that he would not go ahead with the deal; that had said organization of said new bank been made, and the proceedings had as agreed to by the board of directors and as approved by the National Bank Examiner, all of the slow paper and frozen assets [146] would have been placed in a separate corporation, and the new bank would have been able to pay dividends and carry on as a successful banking institution, and neither the depositors' nor any of the stockholders' interests would have been

jeopardized, and no one would have sustained a loss.

That there was subscribed for said new bank the sum of two million dollars ($2,000,000.00) in capital, and two hundred thousand dollars ($200,000.00) in surplus.

That your respondent at all the times while he was either president, vice-president or director of said Bank, used all of his knowledge, skill and experience gained over a period of thirty-odd years of banking to carry said institution along in the manner provided by law, and in accordance with good banking system; that for more than ten years your respondent, through acquiring new connections and new business, was able to earn enough to pay dividends every year had not conditions arisen over which your respondent had no control.

XII.

In answering Paragraph 13 your respondent says that he at no time suppressed or concealed from this complainant, or any other shareholder, any of the facts to which they were entitled, and admits that the trustees for the H. L. Pittock estate, and their associates, controlled and managed the said Bank and had the power so to do.

XIII.

Answering Paragraph 14 your respondent says that O. L. Price, L. B. Menefee, R. V. Jones and Guy M. Standifer, through their stock control, did attempt to sell The Northwestern National Bank in 1923 to the United States National Bank, and in

this [147] connection your respondent says that an officer of The Northwestern National Bank, to wit, O. L. Price, prior to the liquidation of the Bank, offered to sell the said Bank to the First National Bank; that all of these matters and things caused rumors and reports to be circulated, or had a tendency to, and hampered and harassed your respondent in building up the said Bank.

That your respondent did not have anything to do with the offer of sale of said Bank at said time, and in this regard your respondent asks that the complainant be required to make proof of the remaining allegations in said paragraph.

XIV.

In answer to Paragraph 15 your respondent says that it is not true that the statement book under "Items in Transit" would show the slow loans; that, on the contrary, said statement book would show every day all out-of-town checks either accepted as cash or sent for collection, so that all checks that went through the Bank, of whatever kind or character, if they were checks on other Banks, would be shown on the statement book under "Items in Transit," and that in this regard times *was* available of and concerning any check of any depositor's account, and that if the other directors of the Bank did not know what checks were in transit, or what checks were accepted for deposit, it was because they did not care to know and refused to be informed.

In other respects, your respondent admits the allegations contained in Paragraph 15, except as the

same is in this answer varied or qualified, and except that your respondent denies that he at any time had any intent, or knowledge of any action by the Board, to impair the assets of said Bank, and in this connection, and by way of explanation of the action of your respondent of and concerning the matters alleged in said paragraph, your respondent [148] alleges that J. E. Wheeler held approximately twenty-three and one-half per cent (23½%) of the stock in The Northwestern National Bank, and that he, the said Wheeler, did have sufficient money, in case said organization described in Paragraph 15 of complainant's complaint was made, to take his portion of the stock to be subscribed for and paid for in the new liquidating company, and in order that this deal might be carried through this respondent secured a purchaser, ready, able and willing to buy the "Portland Telegram" at the price of nine hundred thousand dollars ($900,000.00), as hereinbefore delineated, and your respondent prays that the explanation of said sale heretofore delineated be read in connection with this paragraph.

XV.

In answer to Paragraph 16, and subheadings "First" and "Second," and the allegations contained in Paragraphs 17, 18, 19, 20, 21, 22, and 23 of said bill of complaint, your respondent says that the matters therein delineated and alleged were matters which happened after he resigned from the board of directors, and after he had resigned as

president, and he has no knowledge of the same, and therefore denies the same, and asks that proof be made of said allegations, and in this connection, in regard to the requests of the National Bank Examiner as alleged in said paragraphs, your respondent says that it is not true that he refused to carry out said deal, but, on the contrary, your respondent urged the board of directors to carry out said deal and stated at said time that it was the only alternative of said Bank and that if said plan was carried out it would meet the approval of the Comptroller and the National Bank Examiner; that notwithstanding the recommendations of your respondent, O. L. Price, afterwards president of said Bank, stated that he had decided not to carry it through; and that [149] it was due to such transactions as this, and the false rumors circulated about said Bank, that the same was forced into liquidation, and not otherwise, and that said Bank was not forced into liquidation because of any precarious condition, as is shown by the matters and things hereinbefore set forth.

WHEREFORE, this respondent prays that complainant's bill may be dismissed, and that he recover his costs and disbursements herein.

SHEPPARD, PHILLIPS & RALSTON,
Attorneys for Respondent, Emery Olmstead.
CHESTER A. SHEPPARD,
Of Counsel. [150]

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

I, Emery Olmstead, being first duly sworn, depose and say that I am one of the respondents in the above-entitled suit; and that the foregoing answer is true, as I verily believe.

(Sgd.) EMERY OLMSTEAD.

Subscribed and sworn to before me this 6th day of January, 1928.

[Notarial Seal]

(Sgd.) WM. C. RALSTON,
Notary Public for Oregon.

My commission expires January 11, 1929.

State of Oregon,
County of Multnomah,—ss.

Due service of the foregoing answer of respondent Emery Olmstead by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 9th day of January, 1928.

W. C. BRISTOL,
Attorney for Complainant.

Filed January 9, 1928. [151]

AND AFTERWARDS, to wit, on Wednesday, the 11th day of July, 1928, the same being the 8th judicial day of the regular July term of said court,—Present the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [152]

In the District Court of the United States for the District of Oregon.

IN EQUITY—E.-8936.

CHARLES A. BURCKHARDT,

Complainant,

vs.

THE NORTHWESTERN NATIONAL BANK, CHARLES K. SPAULDING, PHIL METSCHAN, A. D. CHARLTON, E. S. COLLINS, CHAUNCEY McCORMICK, NATT McDOUGALL, FREDERICK F. PITTOCK, MARK SKINNER, CHARLES H. STEWART, O. L. PRICE, EMERY OLMSTEAD, JAMES F. TWOHY and CHARLES A. MORDEN,

Respondents.

MINUTES OF COURT — JULY 18, 1928—DECREE.

This cause came on to be heard on June 18, 1928, at this term, and the Court heard evidence offered on behalf of the respective parties hereto and argu-

ments of counsel; and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED as follows, viz:

That the complainant failed to establish the allegations of his bill of complaint; that said bill is without equity and complainant is entitled to no relief as to the defendants and said bill of complaint and cause of suit as to said defendants is hereby dismissed, and it is

FURTHER ORDERED, ADUDGED AND DECREED that the defendants have and recover of the complainant their respective costs and disbursements herein to be taxed.

Done this 11th day of July, 1928.

R. S. BEAN,
Judge.

Filed July 11, 1928. [153]

In the District Court of the United States for the District of Oregon.

November Term, 1927.

BE IT REMEMBERED, that on the 10th day of November, 1927, there was duly filed in the District Court of the United States for the District of Oregon, a bill of complaint in words and figures as follows, to wit: [154]

In the District Court of the United States in and for the District of Oregon.

IN EQUITY—No. E.-8939.

FRED A. BALLIN,

Complainant,

vs.

THE NORTHWESTERN NATIONAL BANK, CHARLES K. SPAULDING, PHIL METSCHAN, A. D. CHARLTON, E. S. COLLINS, CHAUNCEY McCORMICK, NATT McDOUGALL, FREDERICK F. PITTOCK, MARK SKINNER, CHARLES H. STEWART, O. L. PRICE, EMERY OLMSTEAD, JAMES F. TWOHY and CHARLES A. MORDEN,

Respondents.

COMPLAINT.

Filed November 10, 1927.

To the Honorable Judges of the Above-entitled Court, in Equity Sitting:

The complaint of Fred A. Ballin, a resident of the city of Los Angeles in the State of California and a citizen of said State of California, exhibited against the above-named respondents, all save Chauncey McCormick being residents and citizens of the State of Oregon and the said Chauncey McCormick a resident of the State of Illinois, doth for cause of suit against the above-named respondents respectfully set forth and show:

Par. 1. That Fred A. Ballin, above-named complainant, and a resident and citizen of the State and District of California in the city of Los Angeles aforesaid is a citizen and resident of a different state than any of [155] the above-named respondents and that there is a diversity of citizenship existing between the complainant and all of the respondents.

That Chauncey McCormick is a resident and citizen of the State of Illinois.

That The Northwestern National Bank is an association under the laws of the United States for carrying on the business of banking under and pursuant to Revised Statutes, Section 5133 and all related sections, defined and designated as Title 12 in United States Code Annotated, as enacted by Congress June 28th, and approved June 30, 1926, and as existing in force December 7, 1925, and prior thereto, with acts amendatory and supplemental thereto and under and pursuant to the laws of the United States in that behalf by Congress ordained and enacted, and during all the times herein mentioned was doing business in the city of Portland and State and District of Oregon and within the jurisdiction of this Honorable Court.

That the respondents O. L. Price, A. D. Charlton, E. S. Collins, Natt McDougall, Phil Metschan, Frederick F. Pittock, Mark Skinner, Charles K. Spaulding, Charles H. Stewart and James T. Twohy were and are the directors of aforesaid The Northwestern National Bank and still are and remain the

directors, and all of them are and each of them is a resident and citizen of the State of Oregon.

That Charles A. Morden was sometime a director of said Bank and is, together with O. L. Price, trustee of the H. L. Pittock estate, and for part of the time herein mentioned was sometime a director of said Bank, and also or lately was the president, [156] treasurer and manager of Oregonian Publishing Company, a composite part of said H. L. Pittock estate, together with O. L. Price as his cotrustee, and a resident and citizen of the State of Oregon.

That Emery Olmstead was and continued to be after the first of the year 1927 president and director of said Bank, but on or about the 28th day of February, 1927, resigned as president and director thereof and the said O. L. Price succeeded him as president of said Bank, having theretofore been and for some time past lately was chairman of the board of directors of said Bank.

Par. 2. That the amount involved in this suit exceeds the sum of three thousand dollars ($3,000.00), exclusive of interest and costs.

Par. 3. That the banking laws of the United States, to wit, Section 5147 of the Revised Statutes as amended by the Act of February 20, 1925, Chapter 274, 43 Statutes 955, and now set forth as Section 73 of Title 12 of the United States Code Annotated, and Section 93 of said Title 12 of said code derived from the Act of June 3, 1864, and incorporated in the Revised Statutes as Section 5239,

are part of and involved with the subject matter of this suit.

Par. 4. That this suit is instituted, commenced and prosecuted by the complainant Fred A. Ballin as a stockholder of The Northwestern National Bank upon [157] behalf of himself and all other stockholders of said Bank for that said Bank and its present directors as aforesaid are the persons by and through whom the matters complained about occurred, were occasioned and were committed and for injuries to said Bank and to its said stockholders by the acts of themselves, the aforesaid directors, no one or any of them, nor said Bank, will sue or cause to be sued nor bring to account any one of themselves as between themselves and said Bank or for and on behalf of any stockholder the matters and things complained of herein, although before the filing of this complaint demand was made that they should correct and right the wrongs herein suffered and that said Bank should proceed to enforce the duties and liabilities of said directors herein complained about.

That this complainant was and is a holder of capital stock or of shares of The Northwestern National Bank during the time of the transactions herein complained of and from and after the date of the issuance of the certificate of stock the matters and things complained of occurred down to and inclusive of the present time, and this suit is not a collusive one to confer in a court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

That this complainant does not have any influence or voice with other shareholders or directors nor is he in any manner identified with said directors, but all of the said above-named respondents and said Bank are and were opposed during all the times herein mentioned to the conduct of the business of said Bank in a way and manner that would and could have obviated the filing of this suit and would and could have protected [158] the rights of the minority shareholders and protected the property and assets of said Bank, but upon the contrary, the majority of the stock held by the above-named respondents, directors, is wholly adverse to the minority and to this complainant and bent upon carrying out at all hazards the matters and things herein complained about through absolute control, through stock ownership by them, the said respondents, as directors, so that they would and did not respect any demand or request of this complainant and each and every one of said respondents are and were antagonistic to the bringing of any suit and that as stockholders their interests were in every way and are antagonistic to the interests of this complainant, whereby and wherein they attempt to affirm the matters and things done and transacted by them herein complained about, and moreover said respondents and all of them, together with said Bank, although having abdicated control and possession of all assets and gone into liquidation as to all matters, save and except such parts of them as related to the interests of stockholders only and the carrying out of such matters

as said directors themselves wished to affirm, the aforesaid respondents are thus using their position to the injury of this complainant, to the injury of said Bank and to the injury of minority stockholders as herein complained about.

Par. 5. That O. L. Price as trustee of the H. L. Pittock estate and Charles A. Morden as cotrustee of the H. L. Pittock estate, and the said O. L. Price always director and sometime chairman of the board and lately during the [159] year 1927 president of said Bank and the said Charles A. Morden himself at the time a director and a member of the board of said Bank, are possessed and hold as trustees of said H. L. Pittock estate seventy-six hundred and ninety-six (7696) shares of the capital stock of said Bank, in so far as this complainant can obtain any information and if it is otherwise or more, this complainant craves that the records be shown thereabout, and that in addition thereto O. L. Price personally holds and has two hundred and ninety (290) shares, and that Frederick F. Pittock has and holds one hundred (100) shares, and that Charles A. Morden individually had or held fifty (50) shares, but whether he holds them now this complainant does not fully know, but this complainant says that there are approximately eighty-two hundred and eighty-six (8286) shares identified with the trustees of the H. L. Pittock estate and under their domination and control, and if not now there lately was during the time of the matters and things herein complained of and just before the institution of this suit such relationship

of and between themselves and with the other respondents above named that with said eighty-two hundred and eighty-six (8286) shares or thereabouts, coupled with some fifty (50) shares held in the name of Edgar B. Piper, identified with the Oregonian Publishing Company, there is somewhere and about not less than eighty-three hundred and thirty-six (8336) shares under their control alone, and this control and ownership of shares of capital stock of said Bank, taken together with the amounts of shares held and owned and standing in the name of other respondents, to wit, Charlton, Collins, McCormick, or Miami Corporation, whichever it is, controlled by McCormick, McDougall, Olmstead, [160] Metschan, Spalding, Stewart and Twohy, so far as this complainant can ascertain and become aware, comprehends an additional thirty-seven hundred and fifty-one (3751) shares, or more, giving to said respondents, directors, the entire and absolute control of said capital stock and any stockholders' meeting, howsoever called, will be controlled and dominated by their said stock and with their allied and confederated interests to the exclusion of any right expressed or to be expressed by this complainant or any other minority stockholder; and this has been the fact during all the times herein mentioned and still exists as the fact.

Par. 6. That complainant was solicited to be and become by the directors of said Bank a stockholder and complainant was persuaded to purchase and take two hundred (200) shares of the capital stock of said The Northwestern National Bank at a repre-

sented reasonable market value of twenty-seven thousand five hundred dollars ($27,500.00) on or about the —— day of 1923, and received certificates No. 101 for said two hundred (200) shares and
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has ever since been the owner and does now hold and own the same.

That at the time complainant became such stockholder the said directors at and during the times of their solicitation in said year 1923 for this complainant to become a stockholder informed and stated to complainant and represented to him that the condition of said Bank with H. L. Pittock, then living as president and with the Pittock fortune and the influence and prestige of his position and identification [161] in the community, as well as the support of the Oregonian and the Oregonian Publishing Company, gave and made for said Bank an unequalled foundation and support in the community and that its financial condition was good and prosperous.

Par. 7. That all of the directors, respondents above named, qualified and took the oath prescribed by law aforesaid before entering upon their respective duties and responsibilities of their office and promised and agreed with this complainant and all other stockholders and with said Bank, so far as the duty involved upon them or each of them, diligently and honestly to administer and each of them would diligently and honestly administer the affairs of the said The Northwestern National Bank, and that no one of them would and that they would

not knowingly violate or willingly permit to be violated any of the provisions of the National Bank Act aforesaid.

Par. 8. That from the time of the organization of said Bank down to and inclusive of the 29th day of March, 1927, the interest of H. L. Pittock in his lifetime and those identified with him and the trustees of the H. L. Pittock estate, to wit, Price and Morden, and those identified with them of the above-named directors, respondents as hereinbefore set forth, were and continued to be the dominant and controlling factor in said Bank and in and about the conduct of its said business and in the selection and maintanance of the directors [162] of said Bank.

Par. 9. That said Bank commenced business January 2, 1913, with a capital of $500,000.00 and a surplus of $100,000.00 and continued with that apparent capital and surplus until on or about the ——, day of ——, 19——, when its capital stock was increased to $1,000,000.00 and its surplus to $200,000.00; and with that apparent capital and surplus it continued down to and inclusive of the 2d day of July, 1922, when it again increased its capital for the third time to $2,000,000.00 with $400,000.00 surplus, and continued with this apparent capital and surplus to and until the 30th day of March, 1927; but out of this last increase was taken upwards of three hundred to three hundred and fifty thousand dollars contributed at the rate of $150.00 per share to be and was charged against and to reduce uncollectible items then due said

Bank with the knowledge, permission and by the act of said respondent directors.

Par. 10. That some time between July 2, 1922, and December 31, 1926, said respondent directors of said Bank knowingly and willingly and with full and complete knowledge and information in respect of each specifically enumerated transaction set forth in this paragraph, so far as complainant can now set forth the same, the facts thereabout being all in possession of said respondents, caused, required and directed to be lost to said Bank in the transactions:

Item 1.	Dufur Orchards Co., in the vicinity [163] of Dufur, Oregon	$400,000.00
Item 2.	A. O. Anderson & Co.	185,000.00
Item 3.	A. Rupert & Co	200,000.00
Item 4.	Bankers Discount Corporation	150,000.00
Item 5.	Phez Corporation	125,000.00
Item 6.	Rock Creek Ranch, sometimes known as the Creath and Burke transactions coupled with Portland Wool Warehouse	75,000.00
Item 7.	C. J. Smith, S. F. Wilson and M. L. Jones, Olex	150,000.00
Item 8.	Davin Michellvi Sheep Co.	200,000.00
Item 9.	G. E. Miller & Co.	40,000.00
Item 10.	D. M. Stuart, Timber Dealer	50,000.00

Item 11.	Sam Nemoro, Clothier	30,000.00
Item 12.	J. E. Wheeler	250,000.00
Item 13.	McCormick Lumber Co. ..	150,000.00
Item 14.	Wheeler Timber Co.	90,000.00
Item 15.	W. E. Wheeler Estate	95,000.00
Item 16.	Telegram Publishing Company	125,000.00

and this complainant cannot say and does not know how much more because the facts are in the possession of the respondents, but charges and says that the records of said bank will show substantially as in this paragraph set forth, and that with the knowledge and information and notice to each of the directors thereabouts, coupled with the fact that in the fall of 1925 or thereabouts and since said time, as well perhaps as prior thereto, the Examiner of National Banks in and of the city of Portland, the name of whom is to this complainant unknown, required all of the Wheeler lines to be reduced upon the ground that there was too much loaned by said bank to one person, and said directors there and then with knowledge of that fact agreed that the lines should be reduced, but nevertheless willfully and knowingly violated [164] the requirements of the Examiner, the requirements of the law and did willfully and knowingly cause to be misapplied and lost to said Bank thereby all of its current and proper assets so that it was forced into liquidation on or about the 30th of March, 1927, by said directors.

Par. 11. That part of the transaction set forth in paragraph 10 hereof and indeed the Wheeler

transactions were of record when Charles A. Morden, at the suggestion of O. L. Price, came to be put upon the board of said Bank and was elected a director of said Bank and at that time O. L. Price was chairman of the board and he, Price, then put Morden on the Examining Committee together with Metchan and Charlton, fellow directors, and they, Metschan, Charlton and Morden, ascertained and knew of the condition of said Bank and of said transactions and reported the same to the board and to their fellow directors and all of the directors, respondents, knew sufficient to put an ordinary and prudent business man upon inquiry as to the actual status and relations of the affairs of said Bank, but said directors willfully and knowingly failed and neglected to do or cause to be done any of those things which ordinary prudent and careful men similarly situated in business transactions would do to save and prevent losses and wrong administration of bank and financial affairs, and upon ascertaining the status of said Bank and without informing the stockholders and shareholders situated like this complainant, but suppressing and keeping to themselves and among their fellow directors hereinabove named the said disclosed [165] facts, Morden demanded to be released as a director and resigned as such and that his stock, to wit, fifty (50) shares, be purchased for the sum of sixty-two hundred and fifty dollars ($6250.00) or thereabouts so far as this complainant can allege the fact to be on information and belief, and believing it to be credible information does say on such belief that

the said Morden was succeeded on said Examining Committee of said board of directors for said Bank by Charles K. Spaulding, one of the directors, and thereafter Phil Metschan, Charles K. Spaulding and A. D. Charlton, the last of whom had been a director since the organization of said Bank, constituted said Examining Committee for said board of directors, and they down to and including the time when Morden left and resigned to the year 1927 made examinations and reports of affairs of the Bank and reported to the board of directors and advised and informed their fellow directors of, in and about all of the same, and did make one report to said directors which was a confidential or private or secret report, original of which was given to Mark Skinner, vice-president, and copies to other officers and directors and kept in the files of said Bank, whereas another and different report was made to the District Bank Examiner and likewise to the Comptroller of the Currency of the United States in such way and manner that the private report would show the real and true condition of said Bank, while the report to the District Bank Examiner and Comptroller of the Currency would show a favorable, but incorrect condition of said Bank, and that if said reports were produced in this court this complainant charges they will show as herein alleged, and that these directors hereinbefore named did during the year 1926, did during the year 1925, and did [166] during the year 1927, and for aught this complainant knows many times prior thereto, suppress and conceal and know-

ingly prevent share and stockholders, like this complainant and others not on the board of directors likewise stockholders, and officials of the United States Government in that behalf given the privilege of law so to know, the real and actual condition of said Bank and its affairs.

Par. 12. That in addition to said Examining Committee there was an executive committee of seven (7) directors and so far as this complainant can inform the Court there were meetings of the whole board in each month and when the whole board met they approved the actions of the executive committee and also of the Examining Committee, and said whole board consisted of the respondents named individually in the caption of this complaint, and the Examining Committee reported to the board every six months, and the executive committee during these periods consisted of O. L. Price, chairman and chairman of the board, A. D. Charlton, Charles K. Spaulding, Phil Metschan, Frederick F. Pittock, Mark Skinner and maybe some others, but at least those, and the complainant alleges that it should and probably did include Emery Olmstead as one of the members of said executive committee, and in adidtion to the information conveyed to said board of directors of said bank by its said committees there was an Examiner's report made on or about the 26th day of November, 1926, directing that all slow and doubtful paper be taken up and retired and a segregation of undesirable assets amounting approximately to one million five hundred thousand dollars [167]

($1,500,000.00) or thereabouts, with items directed to come out of some seven hundred and fifty thousand dollars ($750,000.00), with reductions required in uncollectible credits of some five hundred thousand dollars ($500,000.00), and that there should be immediately retired some two hundred and fifty thousand dollars ($250,000.00) of slow and doubtful paper, and so far as this complainant can say and allege each and every one of said respondents individually named in the caption hereof as directors of said bank at said time knew and were familiar with the aforesaid condition of said bank and that their acts and doings over and during the period from the time of the increase of the capital stock of $2,000,000.00 down to and inclusive of March 30, 1927, caused the liquidation of said bank and it to go out of business with consequent loss, damage and liability to its stock and shareholders as herein shall more fully appear.

Par. 13. That during all this time and between said periods aforesaid said directors suppressed and concealed from this complainant and other share and stockholders of said bank other than themselves, the said directors, in the interest of whom they were allied as aforesaid, all facts and circumstances connected with their transactions and with said bank and gave no information, knowledge or notice to said share or stockholders whereby they might or could have protected themselves and their credit in and about transactions with said Bank, and such stockholders' meetings as were had were always controlled and antagonistically manipulated

by those who were as hereinbefore alleged in possession of the majority and nearly [168] two-thirds of the stock and with the assistance of their friends practically all of the stock except for a few minority stockholders like this complainant and therewith in entire control of said bank.

Par. 14. That in the year 1923 and notwithstanding that at that time J. E. Wheeler, Wheeler estate, Wheeler Timber Company, Telegram Publishing Company and other allied Wheeler interests were, as far as this complainant can ascertain, indebted to this bank in the sum of approximately six hundred thousand dollars ($600,000.00), and the said board of directors of said bank, the respondents above named, and those acting with them at that time, permitted and allowed, when they willfully and knowingly knew and had ascertained that said bank was then under consideration of being sold and disposed of by O. L. Price, L. B. Menafee, R. V. Jones and Guy M. Standifer, through stock control, to The United States National Bank, hereinafter mentioned, in the city of Portland, Oregon, unless as they, the said board, permitted and caused and allowed to come about said J. E. Wheeler, then so indebted to said bank, should purchase or arrange credit to purchase from the said Guy M. Standifer, L. B. Menefee and R. V. Jones forty-two hundred (4200) shares of the capital stock of said bank at one hundred and fifty dollars ($150.00) the share or a total of six hundred and thirty thousand dollars ($630,000.00), and so far as this complainant knows or can ascertain and so

inform the Court, this complainant causes your Honors to know and to be advised and informed that said O. L. Price and his fellow directors connived, permitted, allowed and acknowledged the purchase and the arrangement of the credit [169] for the purchase by said J. E. Wheeler of all of said shares at said price of one hundred and fifty dollars ($150.00) per share, to wit, the said forty-two hundred (4200) shares, and ever since said time and now, so far as this complainant knows, the said J. E. Wheeler has been carrying said shares as share and stockholder of said bank and some forty-seven hundred (4700) shares thereof stand as shareholder in his name, and if the records of said bank are produced and shown herein it will be and appear that the transfers of said stock from said Menefee and from said Jones and from said Standifer were so made and have so remained from the time of such transfer to the present time to the knowledge, notice and information of all of said directors of said bank, and this complainant doth thereabout charge and allege the fact to be that said directors permitted the sale and transfer of said shares at one hundred and fifty dollars ($150.00), and after demanded to repurchase the same at ten cents (10¢), a share without regard to the interest of any other stockholder or shareholder as at that time, and without regard to the interests of this complainant, notwithstanding the matters and things set forth in paragraph 9 hereof; and that each of these things happened, occasioned and were done to the impairment of the bank's condition and

the destruction of its capital stock values by and with the knowledge, action, direction and consent of said above-named directors, respondents herein, as hereinafter alleged.

Par. 15. That in the latter part of 1925 and the fore part of 1926, say about the month of February, 1926, the [170] directors of said bank, the respondents named herein, were informed and aware of a means, method and manner whereby the "Telegram" of the Telegram Publishing Company owned and controlled by J. E. Wheeler or those associated with him, might be sold for a definite and certain ascertained price sufficient to liquidate the larger part of the indebtedness of Wheeler and his allied institutions to the bank and documents were prepared for signature and presented to the said Wheeler who thereabout consulted, as near as this complainant can ascertain and is informed and believes the fact to be, directors Metschan, Spaulding and Charlton and also Morden and also Collins and also Price, and notwithstanding the deal for the sale of the paper was firm and could have been made, said directors so consulted opposed the same and would not allow said paper to be sold in order that the proceeds therefrom might be covered into said bank in discharge of the moneys owed by said Wheeler, and all of said directors, as well as the respondents named, knew and were informed of said transaction and of the refusal to carry it out in February, 1926, whereby there would and could have been saved to the bank a very great deal of the money advanced to said Wheeler and his associated companies and

a large and wholesome reduction made in what was known as the Wheeler lines, but said directors utterly failed and willfully refused to so transact the business of said bank and declined to allow said paper to be sold and the net proceeds in cash covered into said bank.

Par. 16. That during the years 1925 and 1926 and in the course and practice of said bank there was kept a daily [171] position or statement book showing each day's previous business wherein "Items in Transit" were treated as cash and were included in reserve calculations as against deposits and each and every one of the directors named herein, to wit, Charles K. Spaulding, Phil Metschan, A. D. Charlton, E. S. Collins, Chauncey McCormick, Natt McDougall, Frederick F. Pittock, Mark Skinner, Charles H. Stewart, O. L. Price, Emery Olmstead, James F. Twohy and Charles A. Morden, saw, knew what was in said bank, read it, and understood what it meant and discussed the amount of the same and were informed by the Bank Examiners and by the Comptroller of the Currency, and particularly was O. L. Price, Charles H. Stewart and Phil Metschan, who went to see the Comptroller in the city of Washington, D. C., advised and informed and thereby knew how large the sums had been that had been charged off and how stupendous were the transactions representing the impairment of the bank's assets and capital and that the Comptroller advised and required that a million dollars in cash be supplied and be taken out of as, of and upon a plan through a holding company or by the

use of what is known as a liquidating organization in connection with said bank so that the cash might be supplied for the slow and doubtful items caused by the management of said directors and said bank put upon a current condition and that if this were done and the necessary money contributed the said board of directors would be authorized to pay dividends in the spring of 1927, and thereupon said directors of said bank set about a proposal to raise seven hundred and fifty thousand dollars ($750,000.00) by each stockholder putting up thirty-seven and 50/100 dollars ($37.50) based upon said twenty thousand (20,000) shares and seven hundred and fifty thousand dollars ($750,000.00) [172] to be bonded and retired making possible the reconstruction suggested by the Comptroller, but said directors knowingly, willfully and intentionally failed and refused to comply with the directions on request of said Comptroller in that behalf, and nevertheless continued to accommodate the said J. E. Wheeler based upon his endorsement with loans passed on by said directors arising and during and continuing through the fall of the year 1926 and into the year 1927 in violation of the National Banking Act wherein it is provided that the total of such liabilities shall in no event exceed thirty per cent of the capital stock of the association, which would have been not more than six hundred thousand dollars ($600,000.00), to increase and multiply to the sum of six hundred and thirty-four thousand dollars ($634,000.00) or more, so far as your complainant is informed and believes, including the

Telegram Publishing Company for some $120,-000.00, J. E. Wheeler individually for some $234,-000.00, Wheeler Timber Company for some $95,-000.00, W. E. Wheeler estate for another $95,000.00 and W. M. Wheeler, by way of acceptances, in the sum of $90,000.00 or over, all, it is true, guaranteed by the said Wheeler, but composing and comprising more than thirty per cent of the capital stock of the association at that time, and if there was included in the liability of either company or firm the liabilities of the several members thereof it will upon accounting and production of records of said Bank and of said directors be and appear that the same exceeded at all times the amounts allowed by law to the knowledge of said directors and with the willful intent and knowledge of said directors to impair, and they did impair, the assets of said bank. [173]

Par. 17. That on the turn of the year 1927 these aforesaid directors, respondents above named, and in the matters and things hereinbefore alleged continuing and still continuing to do and transact the business of said bank in said manner, allowed and permitted the said bank under their control and direction to get into financial difficulties so that it could not pay its depositors and exposed its stockholders and shareholders to be and become liable over, including this complainant, to assessed liabilities or to liabilities to undertaking banks, to wit, The United States National Bank and the First National Bank, both of the city of Portland, by some time or in some manner to this complainant

unknown, and about February, 1927, leaving the management and direction and the affairs of said bank entirely in the charge and management of O. L. Price, having on or about the last of February or the first of March, 1927, elected him president, and notwithstanding that at or about that time or in the month of February all of said directors had before them plans and proposals upon which had they acted they could have saved said Bank and its assets and prevented its liquidation in this, to wit:

First. That a plan was formulated whereby all stockholders not consenting could have been paid and retired and more than two-thirds were willing, capable and ready and had signed up and executed the plan so to do, that is to say, change said Bank into State Bank and Trust Company with a capital stock sufficient to preserve all of its assets, retire all of its unbankable or disallowed items, and said O. L. Price [174] and those acting with him agreed to said plan, executed the preliminary papers therefor and for the organization of said bank in said manner and said directors agreeing thereto and the necessary amount of stock and money was fully subscribed and complete, and yet the said Price and the said directors acting under his dominance and control refused to carry out and accomplish the said plan and disregarded it entirely and failed and neglected to observe the suggestions of the Comptroller and Bank Examiner as to the necessities of the situation by so refusing,—

Second. That at or about this time the Telegram Publishing Company and some of the Wheeler

institutions became involved in legal proceedings or were threatened therewith and it was brought about that J. E. Wheeler for the further security and protection of said bank was prevailed upon to turn over and entirely divest himself of, for the full protection of the stockholders of said Bank and its depositors and this complainant, all of his properties, including said Telegram and his interests in California, Oregon and elsewhere, to the full payment and satisfaction first of all of his indebtedness and obligations to said bank, but said directors, particularly Metschan, Collins and Price, refused to consider or permit the paper known as the "Telegram," published by the Telegram Publishing Company, to be sold or disposed of and refused to consider or consent to the transfer by Wheeler of assets and property sufficient to cover the whole transactions of the said Wheeler and his companies with said bank and entirely disregarded their aforesaid duties as herein alleged to said bank as said directors under [175] their said several oaths and sat by and did nothing, so far as this complainant is informed and believes and therefore he alleges the fact to be, until the Telegram Publishing Company virtually went into Bankruptcy or was thereabout so to do and Wheeler involved by the rejection of said directors and their said negligent acts and doings in refusing and failing as they then could have done to take over all of the assets of said Wheeler, including said paper, and save loss to said bank.

And so it was that on or about the 2d day of

March, 1927, the officers and directors of The Northwestern National Bank caused to be published on the first page of the "Morning Oregonian" and given out a statement as follows:

> "The Northwestern National Bank announced that the Pittock estate has acquired a larger measure of interest and control in the bank corporation. Associated with the Pittock estate in ownership and operation of the bank are Messrs. E. S. Collins, A. D. Charlton, Chauncey McCormick, Natt McDougall, Phil Metschan, Frederick F. Pittock, O. L. Price, Mark Skinner, Charles K. Spaulding, Charles H. Stewart and James F. Twohy, directors, all well known in Portland and the northwest as men of affairs.
>
> O. L. Price has been elected president of the bank and will have active charge of its business. It will continue to serve the public as a financial institution of first importance and known responsibility."

pursuant to which the said named persons, who are the same identical named persons herein named as respondents and as directors of said bank, left the said Price as president of said Bank and director in virtual and sole management and charge thereof and he, the said Price, with the connivance, consent and willingness of said [176] board of directors to abdicate its responsibilities and duties thereabout caused to be made an agreement with the Portland Clearing House and through it with

The United States National Bank and the First National Bank, both of Portland, Oregon, wherein and whereby all matters and things pertaining to the banking business and the conduct of it in the city of Portland by The Northwestern National Bank, without the consent at that time of the necessary two-thirds under the law of shareholders, including this complainant, was lost and utterly destroyed and at the same time the shareholders and stockholders of said The Northwestern National Bank, including this complainant, thereby subjected to each and every liability to the undertaking banks that may have been or could be said to have been created by the said Price and those directors acting with and about him in that matter, for that said Price and said directors then and there permitted, to wit, in the month of March, 1927, a run upon said bank, being fully advised and informed how they might have prevented the same and how they could have taken steps to have avoided the same, but they, the said Price and his accompanying directors, although fully aware and well advised and informed of the situation, refused and failed to act or do anything to the prejudice and loss of this complainant and all other stockholders of said bank.

Par. 18. That said directors and Price with other officers of said Bank during said times and in the month of March, 1927, made some secret and undisclosed agreement, placed in charge of and with James B. Kerr and by him locked and kept or by someone under his or [177] their direction in a box or vault in Security Savings & Trust Com-

pany in the city of Portland, Oregon, wherein and whereby certain terms and conditions of transfer to said underwriting banks, to wit, The United States National Bank and the First National Bank, both of Portland, Oregon, is set forth with the liabilities and responsibilities involved involving the share and stockholders of said Bank, and this complainant prays disclosure of said agreement so that your Honors may be and become informed thereabout for that said agreement affects the present doing of said directors and disclosed to the stockholders other than themselves, and affects the rights of and state of said Bank in which complainant as shareholder and all other stockholders similarly situated are interested.

Par. 19. That up to the time the Bank closed in March, 1927, the losses made by said directors, so far as this complainant can specify, amounted to more than two million dollars and impaired the capital stock of said Bank, and willfully depreciated and intentionally destroyed the investment of moneys of this complainant therein made as aforesaid.

Par. 20. That up to the time said Bank closed its doors and its banking business was transferred to the aforesaid named Banks said directors, respondents above named, did negligently, carelessly and unlawfully disclose, give out and publish, and were negligently, carelessly and unlawfully disclosing, giving out and [178] publishing private records and affairs to said competitive Banks, to wit, The United States National Bank and the First National Bank, and to the directors of them the said

competitive Banks in the city of Portland in such way and manner as to expose, publish, announce and disclose all of the internal affairs, the loans and discounts, the transactions had and held of The Northwestern National Bank so that in the months of February and March, 1927, before said Bank disclosed it, it became and was by said acts the object of suspicion, rumor and belief, giving rise to that want of confidence and there came about a want of confidence from said cause in the public mind that impaired the credit, impaired the standing, and impaired the worth and facilities of said bank as a banking association, although if said directors had done and performed their full duty to said Bank and its shareholders as required by the Bank Examiner and Comptroller and had lived up to the promises that they had made, no consequence would have befallen said banking business, and this complainant charges said directors and the aforesaid acts to be the cause of the ruin, wreck and disaster to said Bank and of the loss of the then banking business without any compensation whatever.

Par. 21. That this complainant is unable to specify with more particularity and certainty or definiteness the matters and things herein complained about at this time, but prays the disclosure of, from and under the power and jurisdiction of this Court of all the facts and circumstances for that the records thereof and the transactions and papers and documents in respect thereto [179] are in possession of the respondents and not of this complainant, and each and every one of said

respondents including said Bank substantially know in detail and at all times knew in detail of the matters herein charged and specified.

Par. 22. That defendant Bank through Mark Skinner, its vice-president, is now claiming against this complainant that certain moneys now are payable by this complainant to said Bank notwithstanding the wrong and injustice done to complainant by said Bank and by its said directors aforesaid, and they and said Bank and said Skinner are threatening and intending to enforce against complainant payment of said moneys claimed payable, but if an accounting were had between said bank, said directors and complainant, it would and will be found that there is more in right, equity, and justice payable to complainant than to any or either of the respondents herein; and that upon such accounting it would be found and appear that said respondents ought of right, justice and equity pay all such amounts whatever as were wholly lost to shareholders of said Bank, including this complainant, by their actions and conduct aforesaid over and above any just credit or offset whatever, and that against complainant there is no sum or amount payable to said Bank or said directors for said Bank or themselves whatever for that complainant signed no waivers or agreements or ever became in any way a part to the doings of said respondents or gave any consent or assent whatever thereto. [180]

Par. 23. This complainant further charges that the accounts in respect of the above-mentioned transactions and dealings are still open and unset-

tled and that if the account between complainant and respondents were properly taken a considerable balance would be coming from the respondents to your complainant and that said accounts or accounting cannot be properly had or taken in any other court but this wherein the respondents can make a full and true discovery and disclosure of and concerning all and singularly the transactions and matters aforesaid, so that an accounting may be taken by and under the direction and decree of this Honorable Court of all dealings and transactions between this complainant and the said respondents; that in equity and good conscience the respondents should not be allowed to charge complainant with any sums of money, but that on the contrary the respondents ought to be charged in equity with all benefit and advantage wrongfully derived or comprised in the losses hereinabove alleged as against this complainant and to specify and show all of the same, your complainant being ready and willing to submit if it should be found to the contrary to pay any balance that might be properly, equitably and justly by this Court in consonance of its course and practice found to be due if any if it should be over and above the amount lost to complainant as hereinbefore alleged in the acts, doing and transactions of said respondents; that in the meantime the respondents and all of them should be restrained and enjoined by an injunction of this Honorable [181] Court from the continuance, accomplishment, execution or carrying out the wrongful and improper acts entered into and carried on as aforesaid and as herein specified

and described, and from in any manner proceeding against your complainant or doing otherwise than to submit themselves to and unto this Court as by due process in equity they should account.

Par. 24. Forasmuch as said Bank and said respective respondents, directors, will not call to account nor sue or prosecute for the many causes, acts and things herein complained about by or among themselves injuring said Bank, or call each other to account in behalf of said Bank and its shareholders and this complainant and of all other stockholders of said Bank, this complainant is remediless in the premises, all things considered, and wholly without adequate or any remedy, speedy, sufficient, or complete at law in this or any other court or anywhere, as now and during all of said times the above-named respective respondents are in full possession, control and domination of the remaining affairs and/or property of whatever it may be of said Bank or of said association or Bank and are claiming the right to continue to conduct the same agreeable to their own interests, their own resolves, and in perpetuation of the injustice, wrong, and the losses hereinbefore recited; and without the intervention and exercise of the jurisdiction of this Honorable Court in equity according to its due and proper course and practice in such cases complainant cannot have or obtain, nor can all other stockholders have or obtain [182] any competent, complete, speedy, sufficient or adequate relief whatever, and if said respective respondents continue or are allowed to continue as they are now

doing and continuing to do in the exercise of the corporate powers vested in said banking association, complainant and all other stockholders may and in all likelihood will loose their entire investment and be and become subjected to liability as hereinbefore set forth beyond and over to the aforesaid undertaking Banks unless said respective respondents are restrained, enjoined and prevented from continuing their careless, neglectful, wrongful and undutiful financial career aforesaid.

WHEREFORE, complainant prays your Honors to consider and pronounce upon the premises aforesaid, to require the account to be made and stated, to restrain and enjoin the respondents from further acts, doings or proceedings by themselves, their agents, servants, attorneys or employees of and from any act whatever to the prejudice of this complainant or any other stockholder and to desist from the acts, doings and matters herein complained about or any furtherance or further acts in or about the same or in pursuance thereof and wholly to refrain and desist from any matter or thing whatever in pursuance or furtherance of the matters complained about, and that this Court hear and determine the facts herein and decide and adjudge whether and to what extent and whom shall be held and adjudged liable and responsible for the losses and impairment sustained by complainant and all other stockholders of said Bank.

That the said respondents may set forth a [183] list or schedule and description of every deed, book, account, letter, paper or writing relating to the

matters aforesaid, or any of them, or wherein or whereupon there is any note, memorandum, or writing relating in any manner thereto, which now are, or ever were in their, or either and which of their, possession, or power, and may particularly describe which thereof now are in their, or either and which of their possession or power, and may deposit the same with the clerk of this court for the usual purposes, and otherwise that the said respondents may account for such as are not in their possession or power.

And may it please your Honors to grant unto your orator a writ of subpoena, issuing out of and under the seal of this Honorable Court, to be directed to the said respondents, commanding them and each of them, on a day certain and under a certain penalty, in the said writ to be inserted, personally to be and appear before your Honors in this Honorable Court, and then and there full, true and perfect answer make, to all and singular the premises, and further, to stand, to perform, and abide such further orders, direction and decree therein, as to your Honors shall seem meet and shall be agreeable to equity and good conscience.

And that complainant have such further, different, other, additional and also general relief and decree as may be in accordance with the facts and proof in equity cases according to the course and practice of this Honorable Court, with costs.

FRED A. BALLIN,
Complainant.

W. C. BRISTOL,
Solicitor and Attorney. [184]

United States of America,
State and District of California,
County of Los Angeles,—ss.

I, the undersigned, Fred A. Ballin, being first duly sworn on oath depose and say: That I am a resident and citizen of the city of Los Angeles, in the State of California; that I am the complainant named and described in the foregoing bill of complaint; that I know the contents thereof and as to all matters of fact therein stated I believe the same to be in all respects true, and as to all matters therein stated on information and belief so far as the knowledge of this complainant in acquiring said information and belief goes or was had or is possessed, the facts so stated on information and belief are from reliable sources and true as I believe; that the matters and things set forth in said bill of complaint are largely in possession of the respondents themselves and that this complainant verily believes the matters and things set forth are the true state of facts in every respect so far as they have come in any wise to the knowledge of this complainant, and that upon proper order of this Court if the respondents are required to disclose and answer make it will be and appear that the facts stated are in accordance with the records and transactions that are prayed to be deposited in this court as part of this bill of complaint as set forth in the prayer thereof.

FRED A. BALLIN.

Subscribed and sworn to before me this 7th day of November, 1927.

[Seal] DOLORES BINGHAM,

Notary Public for California, Residing at Los Angeles.

My commission expires Sept. 12, 1928.

Filed November 10, 1927. [185]

AND AFTERWARDS, to wit, on the 30th day of November, 1927, there was duly filed in said court, a motion of defendant Chauncey McCormick to quash service of subpoena ad respondendum in words and figures as follows, to wit: [186]

[Title of Court and Cause.]

MOTION TO QUASH SERVICE OF SUBPOENA AND TO DISMISS THE SUIT AS TO THE DEFENDANT CHAUNCEY McCORMICK.

Now comes Chauncey McCormick, named as one of the defendants in the above-entitled suit, and enters his appearance therein specially for the purpose of this motion and not otherwise, and moves for an order setting aside the alleged service of subpoena and complaint upon this defendant and dismissing the suit as to this defendant upon the ground and for the reason that the Court has no jurisdiction and that this suit is not a suit of local nature and this defendant cannot be sued therein in the Dis-

trict of Oregon for that this defendant is a citizen, resident and inhabitant of the Northern District of Illinois, Eastern Division at Chicago, Illinois, and not of the District of Oregon. This motion is based upon the records and files of the [187] court in this suit and upon the affidavit of J. G. Fleck hereto attached.

CAREY and KERR, and
CHARLES A. HART,

Attorneys for Defendant Chauncey McCormick Appearing Specially for the Purpose of this Motion. [188]

[Title of Court and Cause.]

AFFIDAVIT OF J. G. FLECK.

State of Oregon,
County of Multnomah,—ss.

I, J. G. Fleck, being first duly sworn, on oath say that I know Chauncey McCormick named as one of the defendants in the above-entitled suit and have been well acquainted with him for several years past. I know that he resides in the city of Chicago, Illinois, and is a citizen of that state. He has never resided within the District or State of Oregon and is not a citizen of that state.

J. G. FLECK.

Subscribed and sworn to before me this 30th day of November, 1927.

[Notarial Seal] PHILLIP CHIPMAN,
Notary Public for Oregon.

My commission expires August 28, 1931. [189]

District of Oregon,
County of Multnomah,—ss.

Due service of the within motion is hereby accepted in Multnomah County, Oregon, this —— day of —— 192— by receiving a copy thereof, duly certified to as such by Charles H. Carey, of attorneys for defendant.

W. C. BRISTOL.
By F. E. GRIGSBY,
Attorney for Plaintiff.

Filed November 30, 1927. [190]

AND AFTERWARDS, to wit, on the 17th day of of December, 1927, there was duly filed in said court, an answer of the defendants Northwestern National Bank, A. D. Charlton, E. S. Collins, Natt McDougall, Frederick F. Pittock, Mark Skinner, Charles H. Stewart, O. L. Price, and James F. Twohy, in words and figures as follows, to wit: [191]

[Title of Court and Cause.]

ANSWER OF DEFENDANTS, THE NORTHWESTERN NATIONAL BANK, A. D. CHARLTON, E. S. COLLINS, NATT McDOUGALL, FREDERICK F. PITTOCK, MARK SKINNER, CHARLES H. STEWART, O. L. PRICE AND JAMES F. TWOHY.

Now come the defendants, The Northwestern National Bank, A. D. Charlton, E. S. Collins, Natt McDougall, Frederick F. Pittock, Mark Skinner, Charles H. Stewart, O. L. Price and James F. Twohy, and each severally and not jointly answering the bill of complaint herein, do say:

1.

These defendants have no knowledge as to the present residence or citizenship of complainant. At the time he became a stockholder in defendant Bank, and for a number of years thereafter, he was a citizen and resident of Oregon and these defendants are not advised as to the claimed present residence and citizenship and the diversity of citizenship asserted as a result thereof.

Defendant Chauncey McCormick is a resident and citizen [192] of the State of Illinois.

Defendant The Northwestern National Bank is a national banking association organized under the banking laws of the United States and doing business in the city of Portland, Oregon.

Defendants O. L. Price, A. D. Charlton, E. S.

Collings, Natt McDougall, Phil Metschan, Frederick F. Pittock, Mark Skinner, Charles K. Spaulding, Charles H. Stewart and James F. Twohy are and for a number of years last past have been directors of defendant The Northwestern National Bank, and each was and is a citizen and resident of Oregon.

Defendant Charles A. Morden is a citizen and resident of Oregon, and he was at one time a director of defendant The Northwestern National Bank.

It is true that defendants O. L. Price and Charles A. Morden are trustees under the last will and testament of Henry L. Pittock, deceased, and that defendant Charles A. Morden is an officer of Oregonian Publishing Company, a corporation, but these defendants aver that neither of said facts is in any respect pertinent or material to any issue herein. These defendants believe that the reference to said facts in complainant's bill is for some ulterior purpose and constitutes impertinence, and these defendants pray that it be stricken from the bill.

Defendant Emery Olmstead was, prior to March 1, 1927, president and a director of defendant Bank. On that day he was succeeded as such president by defendant O. L. Price, who theretofore had been chairman of the board of directors of defendant Bank. [193]

2.

These defendants are unable to determine from the bill of complaint herein what amount, if any,

is involved in this suit; and they leave complainant to his proof of the allegation that a sum in excess of $3,000.00 is involved.

3.

These defendants are unable to determine from the bill of complaint herein whether the banking statutes referred to in Paragraph 3 of the bill are, as there asserted, a part of and involved with the subject matter of this suit, and leave complainant to his proof of that allegation.

4.

It is not the fact that any wrongs have been committed against the defendant Bank for which these defendants, who are directors, have at any time been unwilling to seek redress. On the contrary, these defendants, and each of them, at all times have been ready and willing, and now are ready and willing to sue and to call to account any and all persons or parties in any manner responsible for wrongs to defendant Bank.

It is not the fact that before the filing of the bill of complaint herein any demand was made upon defendant Bank or upon these individual defendants as its directors, to correct or right the matters referred to as wrongs in the bill of complaint; on the contrary, neither complainant, nor any stockholder of defendant Bank has at any time made any complaint, charge, or statement to defendant Bank or any of its directors, that any such alleged wrongs, had been suffered; nor has any complainant or any stockholder ever demanded or requested

that any step of any kind be taken to redress such supposed [194] wrongs or to enforce any duties or liabilities of these individual defendants as directors of defendant Bank.

Complainant is not in fact a stockholder of defendant Bank. As will be more fully stated hereinafter in this answer, complainant more than a year prior to the filing of this suit assigned and caused to be transferred to Francis P. Graves & Company, of Los Angeles, California, all of the shares of stock in defendant Bank then held by him, and since that time complainant has not been and is not now a stockholder of defendant Bank.

Complainant is not and for more than a year prior to the institution of this suit, has not been, a stockholder of defendant Bank, but if the allegations of Paragraph 4 of the bill of complaint are to be construed as asserting that the owner or owners of the stock formerly held by complainant have not at all times enjoyed each and all of the rights vested in them as stockholders, these defendants deny the charge. The allegations that these individual defendants through majority control of stock were or are adverse or antagonistic to complainant or any stockholder, and were or are attempting through such control to carry out a plan designed to injure defendant Bank and its minority stockholders, and each and all of the statements and insinuations of the last subparagraph of Paragraph 4 of the bill of complaint, are without any foundation in fact and are wholly false and untrue.

5.

These defendants deny that at any time in the entire history of defendant Bank there ever existed any such combination between these individual defendants for the control of [195] the stock of defendant Bank as is alleged in Paragraph 5 of the bill of complaint. It is true that the estate of Henry L. Pittock, of which defendants O. L. Price and Charles A. Morden are trustees, is and for several years last past has been the owner of 7,696 shares out of the total 20,000 shares of stock outstanding, and that defendant O. L. Price individually owns 290 shares and that other individuals and corporations own and hold shares of stock substantially to the number stated in Paragraph 5 of the bill of complaint, except that defendant Charles A. Morden has not been the owner of any shares of stock in defendant Bank since the year 1922. But no combination or confederation for the domination through control of a majority of the stock of defendant Bank has ever existed between these individual defendants, or any of them, or between them or any of them and Edgar B. Piper or the Miami Corporation or any other stockholder. The allegations of Paragraph 5 of the bill of complaint with respect to such combination and control are without foundation in fact and are wholly false and untrue.

6.

Complainant, Fred A. Ballin, became a stockholder of defendant Bank on July 29, 1918, by the acquisition of 100 shares and thereafter and on July 1,

1922, he acquired an additional 100 shares. He continued to be such stockholder until October 18, 1926, at which time all of said stock was assigned and transferred and new certificates issued therefor to Francis P. Graves & Company of Los Angeles, California.

The allegations of Paragraph 6 of the bill of complaint to the effect that representations were made to induce complainant to acquire stock in defendant Bank are not pertinent [196] or material to any issue herein, and these defendants pray that these allegations may be stricken from the bill of complaint. If an answer thereto be required, these defendants say that none of them solicited complainant to acquire stock in defendant Bank, or made any representation to complainant, of the kind alleged, or otherwise, to induce him to become a stockholder.

7.

The directors of defendant Bank, including these individual defendants, took the oath of office prescribed by law before entering upon the performance of their duties as such directors; and these individual defendants do severally say that they have in no manner violated said oath of office but that on the contrary they have faithfully and honestly assumed and performed the duties and obligations of their offices as such directors respectively.

8.

It is not the fact that Henry L. Pittock in his lifetime, and the trustees of his estate after his

death, and any other persons or interests identified with them, dominated or controlled defendant Bank from its organization down to March 29, 1927, or at any time. No such combination for control ever existed, as these defendants have pointed out in their answer to Paragraph 5 of the bill of complaint. Henry L. Pittock in his lifetime, and the trustees of his estate after his death, at no time have exercised or attempted to exercise in and about the affairs of defendant Bank any other or greater rights than those lawfully vested in them as owners of stock of defendant Bank. [197]

9.

Increases of capital and surplus of defendant Bank were made in substantially the amounts and at about the times stated in Paragraph 9 of the bill of complaint. It is true also, although the fact is not pertinent or material to any issue herein, that at the time the capital was increased to $2,000,000 in 1922, the stockholders of defendant Bank, in order to strengthen its position and to offset inevitable and unavoidable losses due to the sudden deflation of values following the termination of the World War, also voluntarily paid in the sum of $500,000, $350,000 of which was credited to the earnings account, the remainder, $150,000, going to surplus, thereby increasing the surplus account from $250,000 to $400,000.

10.

These defendants are unable to determine the exact nature of the charge made against them in Par-

agraph 10 of the bill of complaint. They deny specifically that they or any of them in any manner or to any extent whatsoever, caused, required or directed to be lost the sums listed in said paragraph or any sum, or any assets of said Bank.

Each of the persons and corporations listed in said paragraph is indebted to defendant Bank and in some instances a portion of such indebtedness has been charged to profit and loss. But in each case, excepting the case of McCormick Lumber Company, the indebtedness is the result of inability on the part of the borrowers to repay when due loans made in the ordinary course of business at times and under circumstances such that these individual defendants and the officers of defendant Bank were in no manner at fault in the extension of [198] credit. In large part these loans were made prior to the year 1920, to borrowers then financially responsible and in most instances supported by collateral entirely adequate at the time in value, and the inability of the borrowers to repay the loans when due resulted from the sudden and unexpected drop in merchandise and other values following the cessation of the World War. Since that time the officers of defendant Bank have been active and diligent in their efforts to collect said loans and substantial recoveries have been made and are still being made.

All loans made by defendant Bank to McCormick Lumber Company have been paid in full. The indebtedness now owing by said Lumber Company is the result of the acceptance by defendant Bank for

credit to the account of the McCormick Lumber Company of certain checks and drafts, payment of which was later refused by the drawees. The acceptance of these checks and drafts for immediate credit was without the knowledge of any of these individual defendants and none of said defendants had any notice thereof or any opportunity whatever of preventing such crediting of checks and drafts, and none of said defendants is in any respect chargeable with negligence or fault in respect thereto.

It is not the fact that defendants in 1925 or at any time failed, neglected or refused to comply with any direction of any Bank Examiner or other representative of the Comptroller of the Currency to reduce the line of credit granted to J. E. Wheeler or to any companies in which he was interested. All present indebtedness due from said Wheeler, Wheeler Timber Company, Wheeler Estate and Telegram Publishing Company, is the result of loans made several years prior to 1925 upon a [199] sufficient showing of financial worth and supported in large part by adequate guaranties and/or collateral. Renewals of said loans were made from time to time when the borrowers were unable to pay at maturity, but it is not true that the Examiner of National Banks required the so-called Wheeler lines to be reduced because too much was loaned to one person, and such renewals were never granted in disobedience to any direction or against the advice of any Bank Examiner or other representative of the Comptroller of the Currency.

Further answering Paragraph 10 of the bill of complaint the defendants E. S. Collins, James Twohy, Charles H. Stewart and Mark Skinner severally say:

Defendant Collins became a director of defendant Bank on September 25, 1923; defendant Twohy on August 31, 1922; defendant Stewart on June 20, 1923, and defendant Skinner on January 10, 1922. If complainant's bill is intended as a charge that losses were made in the amounts stated in Paragraph 10 because of improper loans, these last-named defendants say that they were not directors when the loans were made and the loss resulting therefrom, if any, accrued before they assumed office; and since their respective assumption of office no act or omission on their part or on the part of any of them has increased or affected the amount of loss, if any, attributable to such loans.

11.

The allegations of Paragraph 11 of the bill of complaint are wholly untrue. Defendant Charles A. Morden was elected a director of defendant Bank on January 11, 1921, and served as such director until August 31, 1922, when he resigned, having sold his stock for a valuable consideration to [200] defendant Mark Skinner. Defendant Morden served as a member of the Examining Committee from the time of his election as a director until the end of the year 1921 only. During this period the Examining Committee made regular reports to the directors and such reports were regularly spread upon the minutes of the meetings of the

board of directors. But it is not the fact that said reports or any of them showed any condition of wrong administration or impending losses or any condition in the affairs of the defendant Bank requiring action by the directors to avoid loss. During this period and at all times the directors met regularly and carefully reviewed the reports of the Examining Committee and took such action in respect thereto as in the exercise of sound judgment seemed necessary. No reports were suppressed and nothing in the condition of the Bank was ever kept from the stockholders, and it is wholly untrue that defendant Morden resigned as a director because of any such undisclosed condition in the affairs of the Bank.

It is wholly false and untrue that at any time during the existence of the defendant Bank its Examining Committee made any report which would show a favorable but incorrect condition of the Bank or any report which showed any condition of said Bank except the true condition thereof as said Examining Committee found and believed to exist and attempted to disclose by its reports. All reports of the Examining Committee were made to the board of directors of the Bank only and were thereupon placed with the minutes of the meetings of the directors, at which said reports were received, and thereupon all of said reports became available for examination by all stockholders of the Bank and by the District Bank Examiner and any other representative of the Comptroller of the Currency. [201] All reports of the Examining Com-

mittee remained at all times and now remain in the minutes of the directors' meetings and were in fact read and their contents known to and understood by the District Bank Examiner, and could have been read and their contents known to and understood by any stockholder of the Bank or any representative of the Comptroller of the Currency.

It is untrue that the Examining Committee ever made a confidential, private or secret report, or any report, to Mark Skinner, vice-president, or to other officers or directors of the Bank, which showed any condition different from that disclosed by any report made to the District Bank Examiner, or to the Comptroller of the Currency, but whether the Comptroller of the Currency in person received copies of all reports made by the Examining Committee to the board of directors, defendants cannot say, although they aver that copies of such reports of the Examining Committee were sent to the Comptroller of the Currency whenever requested.

12.

These defendants are unable to determine what is attempted to be alleged in Paragraph 12 of the bill of complaint. Pursuant to the requirements of the by-laws of defendant Bank there was at all times an executive committee consisting of a majority of the board of directors, which committee met weekly and passed on applications for credit and kept fully informed in regard to the purchase and sales of securities, loans on collateral, discounts and other business activities of defendant Bank. Regular monthly meetings of the board of directors

were held at which the minutes of meetings of the Executive Committee were regularly read and submitted for approval. [202]

There was also maintained at all times, in accordance with the by-laws of defendant Bank, an examining committee whose duty it was to investigate the affairs and business of defendant Bank twice in each year, and said committee during all of said times carefully investigated the affairs of defendant Bank and reported the results of such investigations to the board of directors; and these defendants allege that throughout the period mentioned in the complaint every effort was made by these defendants to supervise and manage the affairs and business of defendant Bank faithfully and honestly.

On October 22, 1926, the Chief National Bank Examiner of the Twelfth Federal Reserve District advised defendant Bank by letter of the result of an examination of its assets and stated that it would be necessary to provide additional funds to the amount of not less than $1,000,000 in order that nonproducing assets in this total could be eliminated. Thereafter these defendants, acting with the approval of said Bank Examiner, undertook the organization of a corporation capitalized at $1,500,000, one-half thereof to be provided by the stockholders of defendant Bank, each stockholder subscribing $37.50 for each share of bank stock held by him, said new corporation to purchase and take over from defendant Bank nonproducing or "frozen" assets, as described in the report of said Bank Examiner. These defendants made every effort to consummate

said plan but were unable to do so. But thereafter, following a further examination by said Bank Examiner, these defendants determined that it was necessary to levy a full 100% assessment upon the stockholders of defendant Bank, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7,696 shares, undertook and agreed to purchase and pay [203] the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000 and in addition guaranteed the payment of an additional sum of $1,000,000 in order to insure payment to the Bank of the full amount to accrue from said 100% assessment.

The allegation that acts or omissions of these individual defendants as directors from the time of the last increase in capital stock down to March 30, 1927, caused the defendant Bank to go into liquidation is without foundation in fact. Except as hereinabove in this answer to Paragraph 12 admitted, these defendants specifically deny each and every allegation of said Paragraph 12.

13.

It is not the fact that at any time these individual defendants as directors of defendant Bank suppressed or concealed from stockholders any information regarding the condition of the Bank and it is not true that stockholders' meetings were in any respect manipulated or controlled. No such combination among stockholders as is alleged in Paragraph 13 of the bill existed or ever was exercised to control

any action at stockholders' meetings, and during the entire history of defendant Bank the rights of minority stockholders in and about the administration of the affairs of defendant Bank were never in any degree impaired or restricted.

14.

The allegations of Paragraph 14 of the bill of complaint are entirely incorrect and untrue. None of these defendants participated in any way in the acquisition of stock [204] in defendant Bank by J. E. Wheeler, or aided him in any particular in securing credit for, or in the financing of his purchase of said stock. On the contrary, said purchase by J. E. Wheeler of stock theretofore owned by Guy M. Standifer, L. B. Menefee and R. V. Jones was consummated without the knowledge or consent of any of these defendants.

15.

The allegations of Paragraph 15 of the bill of complaint are wholly incorrect and untrue. None of these defendants at any time prevented or attempted to prevent or refused to allow the Telegram Publishing Company or J. E. Wheeler to sell the newspaper published by said Company. On the contrary, these defendant directors at all times after said J. E. Wheeler failed to pay his indebtedness to defendant Bank when due urged that said Wheeler be required, so far as defendant Bank could so require it, to sell sufficient of his assets to enable him to repay his indebtedness to defendant Bank. Defendants Metschan, Spaulding, Charlton,

Collins and Price, as directors, and defendant Morden, who was not a director, in 1925 or 1926, neither had nor attempted to exercise at any time any right to prevent the sale of the newspaper published by the Telegram Publishing Company, but at all such times said defendants, excluding defendant Morden, who was not then a director, urged upon the officers of defendant Bank that said Wheeler be required to make sales whenever possible and liquidate his indebtedness to defendant Bank.

16.

The allegations of Paragraph 16 of the bill of complaint are wholly incorrect and untrue. These individual [205] defendants were fully aware in 1925 and 1926 of the extent to which the assets of defendant Bank were nonproductive or frozen, and at all times during said years, and during the preceding years, had striven faithfully and honestly to convert said frozen assets into bankable productive commercial paper.

In June, 1926, a committee appointed by the directors, consisting of defendants Price, Metschan and Stewart, conferred with the Comptroller of the Currency and requested him to have an examination made of the condition of the Bank so that with the approval of the Comptroller, or his representative, steps could be taken for the elimination of all nonproductive or frozen assets. Thereafter such an examination was made and other conferences were held with the Chief Bank Examiner of the Twelfth Federal Reserve District and the Comp-

troller, and thereafter and in December, 1926, with the approval of the Chief Bank Examiner and the Comptroller, defendant Bank and its directors determined to organize a corporation with a capital of $1,500,000, one-half thereof to be provided by the stockholders of defendant Bank, each stockholder subscribing $37.50 for each share of bank stock held by him, said new corporation to purchase and take over from defendant Bank nonproducing or frozen assets as designated in the report of the Chief Bank Examiner.

These defendants made every effort to consummate said plan but were unable to do so; and when it was ascertained that said plan could not be successfully carried through, these defendants determined that it would be necessary to levy a full 100% assessment upon the stockholders of defendant Bank, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7696 shares, undertook and agreed to purchase [206] and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000 and in addition guaranteed the payment of an additional sum of $1,000,000 in order to insure payment to the Bank of the full amount to accrue from said 100% assessment.

These defendants at no time failed or refused to comply with any direction or request of the Comptroller of the Currency. On the contrary, they at all times worked in co-operation with him, and he with them, in the effort to formulate and carry out

a plan for the elimination of all nonproducing or frozen assets.

It is not the fact that during the fall of 1926, or into the year 1927, as alleged in Paragraph 16 of the bill of complaint, any further loans were made or credit extended to J. E. Wheeler, either directly or upon his endorsement. On the contrary, these individual defendants, for a long time prior thereto, were endeavoring in every way within their power as directors, to secure the retirement, in part at least, of the indebtedness owing by said J. E. Wheeler and the companies in which he was interested.

No loans in excess of the amounts permitted by law were ever made by these defendants to J. E. Wheeler or to companies in which he was interested or to any other persons, firms, or corporations.

17.

The allegations of Paragraph 17 of the bill of complaint are wholly incorrect and untrue. Defendant Bank was never in a condition such that it was unable to pay its depositors upon demand until on March 28, 1927, a run upon the [207] Bank occurred. Whereupon defendant Bank, in order to insure full and immediate payment to all depositors on demand, entered into a contract with United States National Bank and First National Bank of Portland under the terms of which said two Banks agreed to advance and loan to defendant Bank all moneys necessary to enable defendant Bank to pay its depositors on demand, defendant

Bank pledging to said two Banks all of its assets as collateral to said loan and in addition certain of its stockholders, including the Estate of Henry L. Pittock, individually guaranteeing repayment of said loan; and thereupon defendant Bank began liquidation of its assets in order to effect the payment of said loan to said two Banks.

Defendant O. L. Price was elected president of defendant Bank on March 1, 1927, but it is not the fact that thereafter the management of the Bank was left entirely to defendant Price, or that these individual defendants in any respect, or to any degree, delegated any of their duties as directors to the president of the Bank, or to anyone else. And it is not true that in February, 1927, or in March, 1927, or at any other time, these individual defendants, as directors, by the adoption of any plans or proposals before them could have avoided the condition which made necessary in their judgment the agreement with United States National Bank and First National Bank of Portland and the liquidation as hereinabove described. As to the supposed plans or proposals referred to in Paragraph 17 of the bill of complaint, these defendants say:

First. No plan for the reorganization of defendant Bank as a state bank and trust company was ever developed or [208] perfected so that it was possible of accomplishment. Such a plan was at one time suggested during the conferences with the Chief Bank Examiner hereinabove referred to, but it was rejected by defendant Bank and the Chief

Bank Examiner in favor of the plan for transferring the frozen assets to a corporation to be organized with capital furnished by the stockholders of defendant Bank.

Second. So far as these defendants have ever been advised, J. E. Wheeler was never willing to turn over his assets for the protection of defendant Bank, or for the benefit of his creditors, until long after the closing of defendant Bank, although at one time said Wheeler made an indefinite proposal for an assignment provided defendant Bank would advance large additional sums of money. Certainly none of these defendants deterred or in any way prevented or dissuaded said Wheeler from any such transfer of assets, but, on the contrary, were at all times anxious and willing and often demanded that said Wheeler should liquidate his property and assets in any way possible so that his indebtedness to defendant Bank might be paid.

Further answering Paragraph 17 of the bill of complaint these defendants admit that the officers and directors of defendant Bank caused to be published, on March 2, 1927, the announcement quoted on page 22 of the bill, but it is not true that the directors of the Bank left the sole management and control to defendant Price or in any manner abdicated their responsibilities as directors. Nor is it true that the run on the Bank, which occurred almost four weeks later, was permitted by defendant Price and these individual defendants as directors of the Bank, or any of them, or that they refrained from doing everything in their power to prevent it.
[209]

The announcement so published on March 2, 1927, resulted from the fact that at that time the directors of defendant Bank having been unable to carry through the plan for the organization of a corporation to take over nonproducing or frozen assets, decided that with the consent and approval of the Chief Bank Examiner, an assessment of 100% upon the capital stock of the Bank should be made, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000, and in addition guaranteed the payment of an additional sum of $1,000,000, in order to insure payment to defendant Bank of the full amount to accrue from said 100% assessment.

18.

It is not the fact that any secret or undisclosed agreements have been made as alleged in Paragraph 18 of the bill of complaint. The agreements said to have been placed in the custody of James B. Kerr are the agreements already referred to in this answer between defendant Bank and its guaranteeing stockholders on the one hand and the United States National Bank and the First National Bank of Portland on the other. Said agreements were not kept secret, but, on the contrary, were presented to and duly ratified at a meeting of the stockholders of defendant Bank held May 3, 1927, and said agreements were thereupon spread upon the

minutes of the stockholders' meeting of May 3, 1927. At said meeting the shares of stock alleged in the bill to belong to complainant were represented by the proxy of the record owner, Francis P. [210] Graves & Company, and said stock was duly voted at said meeting in favor of the ratification of said agreements, and the owner of said stock should be and is estopped from objecting to the making of said agreements.

19.

It is not the fact that the directors of defendant Bank made or caused losses to said Bank in two million dollars, or in any sum, nor is it the fact that the directors impaired the capital stock of the Bank or wilfully or intentionally depreciated or destroyed any investment in the stock of the Bank.

20.

It is not the fact that these defendants gave out or published improperly or carelessly or negligently or unlawfully any information about the internal affairs of the Bank that in any way caused or aided in bringing about the run upon the Bank on March 28, 1927. It is true that negotiations were had on one or more occasions for the sale and transfer to another bank of the assets, business, and goodwill of defendant Bank, and that the prospective purchaser was given such information about the properties offered for sale as was necessary to the negotiations. But the directors conducting such negotiations acted honestly and faithfully in the interest of defendant Bank and its stockholders, and at no time did they improperly disclose or make

public the private affairs of the Bank or give out any information which in any way worked to the disadvantage of the Bank.

21.

These defendants are ready and willing to disclose any and all facts in their possession which may be relevant [211] or pertinent to any issue herein. But all books and records of defendant Bank are, and at all times have been, open to and available for inspection by the stockholders of defendant Bank.

22.

These defendants admit that defendant Bank is now claiming that complainant is indebted to defendant Bank. Except as thus admitted, these defendants specifically deny each and every allegation of Paragraph 22 of the bill of complaint.

Complainant is indebted to defendant Bank in the sum of $10,000, with accrued and accruing interest. This indebtedness complainant has for a number of years failed to pay, but has insisted upon renewals of his notes as they respectively matured. These defendants say that nothing in any of the matters attempted to be set out in complainant's bill justifies complainant's failure to pay his indebtedness to defendant Bank, but that defendant Bank should be permitted, notwithstanding complainant's demands herein, to enforce immediate payment by complainant of the principal and interest of his debt.

23.

The answer made by these defendants to Para-

graph 22 of the bill of complaint sufficiently answers Paragraph 23 of the bill. No accounting of any kind is due complainant from defendant Bank or from any of these defendants, and complainant should not be permitted to use the demands or claims asserted in his bill as an excuse for withholding payment of his overdue obligation to defendant Bank.

24.

For their answer to Paragraph 24 of the bill of complaint these defendants say that the bill is without equity. [212] These individual defendants and defendant Bank have not at any time refrained, and are not now refraining, from any necessary or proper step for the redress of any wrong done to defendant Bank, but nothing in any of the matters attempted to be stated in the bill justifies the charge that any director has committed any wrong toward defendant Bank, and no stockholder, prior to the institution of a suit brought by a stockholder, one Charles A. Burckhardt, simultaneously with the filing of this bill, has ever made any complaint to defendant Bank, or its directors, of any such wrong, nor has any demand ever been made for the redress of any such supposed wrong.

The control which these individual defendants now have over the affairs and property of defendant Bank is that only which these individual defendants as directors and officers of defendant Bank should properly and lawfully exercise, and it is, and at all times has been, in subordination to the rights

of the stockholders under the articles of incorporation and by-laws duly adopted.

For a further and separate answer and by way of abatement of this suit, these defendants severally say that complainant is without right, authority, or qualification to bring this proceeding, and the proceeding should be abated and dismissed.

Complainant is not, and at the time of commencing this suit was not, a stockholder of defendant Bank. On October 18, 1926, complainant endorsed and transferred to Francis P. Graves & Company the stock in defendant Bank theretofore owned by him, and at his direction said stock was thereupon transferred [213] upon the books of defendant Bank and new certificates therefor issued to the transferee. Since October 18, 1926, complainant has not been a stockholder in defendant Bank.

WHEREFORE, These defendants, having fully answered the bill of complaint herein, pray that they be hence dismissed with costs and their disbursements herein taxed against complainant.

CHARLES H. CAREY,
JAMES B. KERR,
CHARLES A. HART,
CHARLES E. McCULLOCH,

Attorneys for the Above-named Answering Defendants.

CAREY AND KERR,
Of Counsel.

M. A. ZOLLINGER,
Of Counsel for Defendant E. S. Collins.

[214]

State of Oregon,
County of Multnomah,—ss.

I, O. L. Price, make solemn oath and say: I am president of the Northwestern National Bank, a corporation, one of the above-named defendants; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

O. L. PRICE.

Subscribed and sworn to before me this 15th day of December, 1927.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

State of Oregon,
County of Multnomah,—ss.

I, A. D. Charlton, make solemn oath and say: I am one of the above-named defendants; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

A. D. CHARLTON.

Subscribed and sworn to before me this 15th day of December, 1927.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

State of Oregon,
County of Multnomah,—ss.

I, E. S. Collins, make solemn oath and say: I am one of the above-named defendants; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

E. S. COLLINS.

Subscribed and sworn to before me this 16th day of December, 1927.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires Aug. 28, 1931. [215]

State of Oregon,
County of Multnomah,—ss.

I, Natt McDougall, make solemn oath and say: I am one of the above-named defendants; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

NATT McDOUGALL.

Subscribed and sworn to before me this 16th day of December, 1927.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

State of Oregon,
County of Multnomah,—ss.

I, Frederick F. Pittock, make solemn oath and say: I am one of the above-named defendants; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

FREDERICK F. PITTOCK.

Subscribed and sworn to before me this 15th day of December, 1927.

[Notarial Seal] I. F. PHIPPS,
Notary Public for Oregon.

My commission expires Dec. 21, 1928.

State of Oregon,
County of Multnomah,—ss.

I, Mark Skinner, make solemn oath and say: I am one of the above-named defendants; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

MARK SKINNER.

Subscribed and sworn to before me this 15th day of December, 1927.

[Notarial Seal] I. F. PHIPPS,
Notary Public for Oregon.

My commission expires Dec. 21, 1928. [216]

State of Oregon,
County of Multnomah,—ss.

I, Charles H. Stewart, make solemn oath and say: I am one of the above-named defendants; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

CHARLES H. STEWART.

Subscribed and sworn to before me this 15th day of December, 1927.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

State of Oregon,
County of Multnomah,—ss.

I, O. L. Price, make solemn oath and say: I am one of the above-named defendants; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

O. L. PRICE.

Subscribed and sworn to before me this 15th day of December, 1927.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

State of Oregon,
County of Multnomah,—ss.

I, Charles A. Hart, make solemn oath and say: I am attorney for James F. Twohy, one of the above-named defendants. I have read and know the contents of the foregoing answer made on behalf of said defendant and I believe it to be true; and I made this verification on behalf of the defendant James F. Twohy because said defendant is absent from the district of Oregon, wherein this suit is brought.

CHARLES A. HART.

Subscribed and sworn to before me this 16 day of December, 1927.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires Aug. 28, 1931. [217]

State of Oregon,
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 17th day of December, 1927, by receiving a copy thereof, duly certified to as such by Charles A. Hart, of attorneys for within named defendants.

W. C. BRISTOL,
Attorney for Plaintiff.

Filed December 17, 1927. [218]

AND AFTERWARDS, to wit, on the 19th day of December, 1927, there was duly filed in said court, an answer of defendant Charles K. Spaulding, in words and figures as follows, to wit: [219]

[Title of Court and Cause.]

ANSWER OF DEFENDANT CHARLES K. SPAULDING.

Now comes the defendant, Charles K. Spaulding, and answering the bill of complaint herein, says:

I.

This answering defendant has no knowledge as to the present residence or citizenship of complainant. At the time he became a stockholder in defendant Bank, and for a number of years thereafter, he was a citizen and resident of Oregon and this defendant is not advised as to the claimed present residence and citizenship and the diversity of citizenship asserted as a result thereof.

Defendant Chauncey McCormick is a resident and citizen of the State of Illinois.

Defendant The Northwestern National Bank is a national banking association organized under the banking laws of the United States and doing business in the city of Portland, Oregon.

Defendants O. L. Price, A. D. Charlton, E. S. Collins, Natt McDougall, Phil Metschan, Frederick F. Pittock, Mark Skinner, [220] Charles K.

Spaulding, Charles H. Stewart and James F. Twohy are and for a number of years last past have been directors of defendant The Northwestern National Bank, and each was and is a citizen and resident of Oregon.

Defendant Charles A. Morden is a citizen and resident of Oregon, and he was at one time a director of defendant The Northwestern National Bank.

It is true that defendants O. L. Price and Charles A. Morden are trustees under the last will and testament of Henry L. Pittock, deceased, and that defendant Charles A. Morden is an officer of Oregonian Publishing Company, a corporation, but this defendant avers that neither of said facts is in any respect pertinent or material to any issue herein. This defendant believes that the reference to said facts in complainant's bill is for some ulterior purpose and constitutes impertinence.

Defendant Emery Olmstead was, prior to March 1, 1927, president and a director of defendant Bank. On that day he was succeeded as such president by defendant O. L. Price, who theretofore had been chairman of the board of directors of defendant Bank.

II.

This defendant is unable to determine from the bill of complaint herein what amount, if any, is involved in this suit, and he leaves complainant to his proof of the allegation that a sum in excess of $3,000.00 is involved.

III.

This defendant is unable to determine from the

bill of complaint herein whether the banking statutes referred to in paragraph 3 of the bill are, as there asserted, a part of any involved with the subject matter of this suit, and denies that the laws referred to in Paragraph 3 of the bill are a part of [221] or involved in this suit.

IV.

It is not the fact that any wrongs have been committed against the defendant Bank for which the defendants, who are or were directors, have at any time been unwilling to seek redress. On the contrary, the defendants, who are and were directors, and each of them, at all times have been ready and willing, and now are ready and willing to sue and to call to account any and all persons or parties in any manner responsible for wrongs to defendant Bank.

It is not the fact that before the filing of the bill of complaint herein any demand was made upon defendant Bank or upon the individual defendants as its directors, to correct or right the matters referred to as wrongs in the bill of complaint; on the contrary, neither complainant, nor any stockholder of defendant Bank has at any time made any complaint, charge, or statement to defendant Bank or any of its directors, that any such alleged wrongs had been suffered; nor has complainant or any stockholder ever demanded or requested that any step of any kind be taken to redress such supposed wrongs or to enforce any duties or liabilities

of the individual defendants as directors of defendant Bank or otherwise.

Complainant is not in fact a stockholder of defendant Bank. As will be more fully stated hereinafter in this answer, complainant more than a year prior to the filing of this suit assigned and caused to be transferred to Francis P. Graves & Company, of Los Angeles, California, all of the shares of stock in defendant Bank then held by him, and since that time complainant has not been and is not now a stockholder of defendant Bank.

Complainant is not and for more than a year prior to [222] the institution of this suit, has not been, a stockholder of defendant Bank, but if the allegations of paragraph 4 of the bill of complaint are to be construed as asserting that the owner or owners of the stock formerly held by complainant have not at all times enjoyed each and all of the rights vested in them as stockholders, this defendant denies the charge. The allegations that the individual defendants through majority control of stock were or are adverse or antagonistic to complainant or any stockholder, or were or are attempting through such control to carry out a plan designed to injure defendant Bank and its minority stockholders, and each and all of the statements and insinuations of the last subparagraph of Paragraph 4 of the bill of complaint, are without any foundation in fact and are untrue and are denied.

V.

This defendant denies that at any time in the

entire history of defendant Bank there ever existed any such combination between the individual defendants for the control of the stock of defendant Bank as is alleged in Paragraph 5 of the bill of complaint or otherwise or at all. It is true that the estate of Henry L. Pittock, of which defendants O. L. Price and Charles A. Morden are trustees, is and for several years last past has been the owner of 7,696 shares out of the total 20,000 shares of stock outstanding, and that defendant O. L. Price individually owns 290 shares and that other individuals and corporations own and hold shares of stock substantially to the number stated in Paragraph 5 of the bill of complaint, except that defendant Charles A. Morden has not been the owner of any shares of stock in defendant Bank since the year 1922. But no combination or confederation for the domination through control of a majority of the stock of defendant Bank has ever existed between this defendant and any other director or stockholder. [223] As they have reference to this defendant the allegations of Paragraph 5 of the bill of complaint with respect to such combination and control are without foundation in fact and are untrue and are denied.

VI.

Complainant, Fred A. Ballin, became a stockholder of defendant Bank on July 29, 1918, by the acquisition of 100 shares and thereafter and on July 1, 1922, he acquired an additional 100 shares. He continued to be such stockholder until October 18, 1926, at which time all of said stock was assigned

and transferred and new certificates issued therefor to Francis P. Graves & Company of Los Angeles, California.

The allegations of Paragraph 6 of the bill of complaint to the effect that representations were made to induce complainant to acquire stock in defendant Bank are not pertinent or material to any issue herein. If an answer thereto be required, this defendant says that he did not solicit complainant to acquire stock in defendant Bank, or make any representation to complainant, of the kind alleged, or otherwise, to induce him to become a stockholder.

VII.

The directors of defendant Bank, including this defendant, took the oath of office prescribed by law before entering upon the performance of their duties as such directors; and this defendant says that he has in no manner violated said oath of office but that on the contrary he has faithfully and honestly assumed and performed the duties and obligations of his office as such director.

VIII.

It is not the fact that Henry L. Pittock in his lifetime, or the trustees of his estate after his death, or any other [224] persons or interests identified with them, dominated or controlled defendant Bank from its organization down to March 29, 1927, or at any time. No such combination for control ever existed, as this defendant has pointed out in his answer to Paragraph 5 of the bill of complaint. Henry L. Pittock in his lifetime, and the trustees

of his estate after his death, at no time have exercised or attempted to exercise in or about the affairs of defendant Bank any other or greater rights than those lawfully vested in them as owners of stock of defendant Bank. This defendant avers that during all the time he was a director of the defendant Bank that he was independent of the domination or control of any person, persons or corporation, and that at all such times he acted independently as he deemed to be for the best interests of the Bank and all of its stockholders.

IX.

Increases of capital and surplus of defendant Bank were made in substantially the amounts and at about the times stated in Paragraph 9 of the bill of complaint. It is true also, although the fact is not pertinent or material to any issue herein, that at the time the capital was increased to $2,000,000 in 1922, the stockholders of defendant Bank, in order to strengthen its position and to offset inevitable and unavoidable losses due to the sudden deflation of values following the termination of the World War, also voluntarily paid in the sum of $500,000, $350,000 of which was credited to the earnings account, the remainder, $150,000, going to surplus, thereby increasing the surplus account from $250,000 to $400,000.

X.

This defendant is unable to determine the nature of the charge made against the defendants in Paragraph 10 of the bill of complaint. He denies spe-

cifically that he in any manner or to [225] any extent whatsoever, caused, required or directed to be lost the sums listed in said paragraph or any sum, or any assets of said Bank.

Each of the persons and corporations listed in said paragraph is indebted to defendant Bank and in some instances a portion of such indebtedness has been charged to profit and loss. But in each case, excepting the case of McCormick Lumber Company, the indebtedness is the result of inability on the part of the borrowers to repay when due loans made in the ordinary course of business at times and under circumstances such that this individual defendant was in no manner at fault in the extension of credit. In large part these loans were made prior to the year 1920, to borrowers then financially responsible and in most instances supported by collateral entirely adequate at the time in value, and the inability of the borrowers to repay the loans when due resulted from the sudden and unexpected drop in merchandise and other values following the cessation of the World War. Since that time the officers of defendant Bank have been active and diligent in their efforts to collect said loans and substantial recoveries have been made and are still being made.

All loans made by defendant Bank to McCormick Lumber Company have been paid in full. The indebtedness now owing by said Lumber Company is the result of the acceptance by defendant Bank for credit to the account of the McCormick Lumber Company of certain checks and drafts, payment of

which was later refused by the drawees. The acceptance of these checks and drafts for immediate credit was without the knowledge of this defendant and he had no notice thereof or opportunity whatever of preventing such crediting of checks or drafts, and he is in no respect chargeable with negligence or fault in respect thereto.

It is not the fact that this defendant in 1925 or at any time failed, neglected or refused to comply with any direction of any Bank Examiner or other representative of the [226] Comptroller of the Currency to reduce the line of credit granted to J. E. Wheeler or to any companies in which he was interested. All present indebtedness due from said Wheeler, Wheeler Timber Company, Wheeler Estate and Telegram Publishing Company, is the result of loans made several years prior to 1925 upon a sufficient showing of financial worth and supported in large part by adequate guaranties and/or collateral. Renewals of said loans were made from time to time when the borrowers were unable to pay at maturity, but it is not true that the Examiner of National Banks required the so-called Wheeler lines to be reduced because too much was loaned to one person, and such renewals were never granted in disobedience to any direction or against the advice of any Bank Examiner or other representative of the Comptroller of the Currency.

Further answering Paragraph 10 of the bill of complaint defendant says that he became a director of the defendant Bank on the 31st day of August,

1922. If complainant's bill is intended as a charge that losses were made in the amounts stated in Paragraph 10 because of improper loans, this defendant says that he was not a director when the loans were made and the loss resulting therefrom, if any, accrued before he assumed office; and since his assumption of office no act or omission on his part has increased or affected the amount of loss, if any, attributable to such loans.

XI.

The allegations of Paragraph 11 of the bill of complaint are untrue and are denied. Defendant Charles A. Morden was elected a director of defendant Bank on January 11, 1921, and served as such director until August 31, 1922, when he resigned, having sold his stock for a valuable consideration to defendant Mark Skinner. Defendant Morden served as a member of the Examining Committee from the time of his election as a [227] director until the end of the year 1921 only. During this period the Examining Committee made regular reports to the directors and such reports were regularly spread upon the minutes of the meetings of the board of directors. But it is not the fact that said reports or any of them showed any condition of wrong administration or impending losses or any condition in the affairs of the defendant Bank requiring action by the directors to avoid loss. During this period and at all times the directors met regulary and carefully reviewed the reports of the Examining Committee and took such action in respect thereto as in the exercise of sound

judgment seemed necessary. No reports were suppressed and nothing in the condition of the Bank was ever kept from the stockholders, and it is untrue that defendant Morden resigned as a director because of any such undisclosed condition in the affairs of the Bank.

It is untrue that at any time during the existence of the defendant Bank its Examining Committee made any report which would show a favorable but incorrect condition of the Bank or any report which showed any condition of said Bank except the true condition thereof as said Examining Committee found and believed to exist and attempted to disclose by its reports. All reports of the Examining Committee were made to the board of directors of the Bank only and were thereupon placed with the minutes of the meetings of the directors, at which said reports were received, and thereupon all of said reports became available for examination by all stockholders of the Bank and by the District Bank Examiner and any other representative of the Comptroller of the Currency. All reports of the Examining Committee remained at all times and now remain in the minutes of the directors' meetings and were in fact read and their contents known to and understood by the District Bank Examiner, and could have been read and their contents known to and understood [228] by any stockholder of the Bank or any representative of the Comptroller of the Currency.

It is untrue that the Examining Committee ever made a confidential, private or secret report, or any

report, to Mark Skinner, vice-president, or to other officers or directors of the Bank, which showed any condition different from that disclosed by any report made to the District Bank Examiner, or to the Comptroller of the Currency, but whether the Comptroller of the Currency in person received copies of all reports made by the Examining Committee to the board of directors, defendant cannot say, although he avers that copies of such reports of the Examining Committee were sent to the Comptroller of the Currency whenever requested.

XII.

This defendant is unable to determine what is attempted to be alleged in Paragraph 12 of the bill of complaint. Pursuant to the requirements of the by-laws of defendant Bank there was at all times an executive committee consisting of a majority of the board of directors, which committee met weekly and passed on applications for credit and kept fully informed in regard to the purchase and sales of securities, loans on collateral, discounts and other business activities of defendant Bank. Regular monthly meetings of the board of directors were held at which the minutes of meetings of the Executive Committee were regularly read and submitted for approval.

There was also maintained at all times, in accordance with the by-laws of defendant Bank, an examining committee whose duty it was to investigate the affairs and business of defendant Bank twice in each year, and said committee during all of said times carefully investigated the affairs of

defendant Bank and reported the results of such investigations to the board of [229] directors; and this defendant alleges that throughout the period mentioned in the complaint every effort was made by him with respect to all matters coming within the scope of his office or duty as a director to supervise and manage the affairs and business of defendant Bank faithfully and honestly.

On October 22, 1926, the Chief National Bank Examiner of the Twelfth Federal Reserve District advised defendant Bank by letter of the result of an examination of its assets and stated that it would be necessary to provide additional funds to the amount of not less than $1,000,000 in order that nonproducing assets in this total could be eliminated. Thereafter this defendant with other defendants, acting with the approval of said Bank Examiner, undertook the organization of a corporation capitalized at $1,500,000, one-half thereof to be provided by the stockholders of defendant Bank, each stockholder subscribing $37.50 for each share of bank stock held by him, said new corporation to purchase and take over from defendant Bank nonproducing or "frozen" assets, as described in the report of said Bank Examiner. Such acting defendants made every effort to consummate said plan but were unable to do so. But thereafter, following a further examination by said Bank Examiner, it was determined to be necessary to levy a full 100% assessment upon the stockholders of defendant Bank, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding

7,696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000 and in addition guaranteed the payment of an additional sum of $1,000,000 in order to insure payment to the Bank of the full amount to accrue from said 100% assessment.

The allegation that acts or omissions of this defendant [230] as a director or otherwise caused defendant Bank to go into liquidation is untrue. Except as hereinabove in this answer to Paragraph 12 admitted, this defendant specifically denies each and every allegation of said Paragraph 12.

XIII.

It is not the fact that at any time this defendant suppressed or concealed from stockholders any information regarding the condition of the Bank and it is not true that stockholders' meetings were in any respect manipulated or controlled by this defendant or by any person in combination with him. No such combination among stockholders as is alleged in Paragraph 13 of the bill existed.

XIV.

The allegations of Paragraph 14 of the bill of complaint are untrue. This defendant did not participate in any way in the acquisition of stock in defendant Bank by J. E. Wheeler, or aid him in any particular in securing credit for, or in the financing of his purchase of said stock. On the contrary, said purchase by J. E. Wheeler of stock

theretofore owned by Guy M. Standifer, L. B. Menefee and R. V. Jones was consummated without the knowledge or consent of this defendant.

XV.

The allegations of Paragraph 15 of the bill of complaint are untrue. This defendant at no time prevented or attempted to prevent or refuse to allow the Telegram Publishing Company or J. E. Wheeler to sell the newspaper published by said Company. On the contrary, this defendant at all times after said J. E. Wheeler failed to pay his indebtedness to defendant Bank when due, urged that said Wheeler be required, so far as defendant Bank could so require it, to sell sufficient of his assets to enable him to repay his indebtedness to defendant Bank. [231] Defendants Metschan, Spaulding, Charlton, Collins and Price, as directors, and defendant Morden, who was not a director, in 1925 or 1926, neither had nor attempted to exercise at any time any right to prevent the sale of the newspaper published by the Telegram Publishing Company, but at all such times said defendants, excluding defendant Morden, who was not then a director, urged upon the officers of defendant Bank that said Wheeler be required to make sales whenever possible and liquidate his indebtedness to defendant Bank.

XVI.

The allegations of Paragraph 16 of the bill of complaint are untrue. This defendant was fully aware in 1925 and 1926 of the extent to which the

assets of defendant Bank were nonproductive or frozen, and at all times during said years, and during the preceding years, had striven faithfully and honestly to convert said frozen assets into bankable productive commercial paper.

In June, 1926, a committee appointed by the directors, consisting of defendants Price, Metschen and Stewart, conferred with the Comptroller of the Currency and requested him to have an examination made of the condition of the Bank so that with the approval of the Comptroller, or his representative, steps could be taken for the elimination of all nonproductive or frozen assets. Thereafter such an examination was made and other conferences were held with the Chief Bank Examiner of the Twelfth Federal Reserve District and the Comptroller, and thereafter and in December, 1926, with the approval of the Chief Bank Examiner and the Comptroller, defendant Bank and its directors determined to organize a corporation with a capital of $1,500,000, one-half thereof to be provided by the stockholders of defendant Bank, each stockholder subscribing [232] $57.50 for each share of bank stock held by him, said new corporation to purchase and take over from defendant Bank nonproducing or frozen assets as designated in the reports of the Chief Bank Examiner.

This defendant and other defendants made every effort to consummate said plan but were unable to do so, and when it was ascertained that said plan could not be successfully carried through, it was determined to be necessary to levy a full 100%

assessment upon the stockholders of defendant Bank, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7,696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000 and in addition guaranteed the payment of an additional sum of $1,000,000 in order to insure payment to the Bank of the full amount to accrue from said 100% assessment.

This defendant at no time failed or refused to comply with any direction or request of the Comptroller of the Currency. On the contrary, he at all times worked in co-operation with him, in the effort to formulate and carry out a plan for the elimination of all nonproducing or frozen assets.

It is not the fact that during 1926, or 1927, as alleged in Paragraph 16 of the bill of complaint, any further loans were made or credit extended to J. E. Wheeler, either directly or upon his endorsement. On the contrary, these individual defendants, for a long time prior thereto, were endeavoring in every way within their power as directors, to secure the retirement, in part at least, of the indebtedness owing by said J. E. Wheeler and the companies in which he was interested.

No loans in excess of the amounts permitted by law were ever made by these defendants to J. E. Wheeler or to companies in [233] which he was interested or to any other persons, firms or corporations.

XVII.

The allegations of Paragraph 17 of the bill of complaint are untrue. Defendant Bank was never in a condition such that it was unable to pay its depositors upon demand until on March 28, 1927, a run upon the Bank occurred. Whereupon defendant Bank, in order to insure full and immediate payment to all depositors on demand, entered into a contract with United States National Bank and First National Bank of Portland under the terms of which said two Banks agreed to advance and loan to defendant Bank all moneys necessary to enable defendant Bank to pay its depositors on demand, defendant Bank pledging to said two Banks all of its assets as collateral to said loan and in addition certain of its stockholders, including the Estate of Henry L. Pittock, individually guaranteeing repayment of said loan; and thereupon defendant Bank began liquidation of its assets in order to effect the payment of said loan to said two Banks.

Defendant O. L. Price was elected president of defendant Bank on March 1, 1927, but it is not the fact that thereafter the management of the Bank was left entirely to defendant Price, or that this defendant in any respect, or to any degree, delegated any of his duties as director to the president of the Bank, or to anyone else. And it is not true that in February, 1927, or in March, 1927, or at any other time, the directors, by the adoption of any plans or proposals before them could have avoided the condition which made necessary in their judgment the agreement with United States National

Bank and First National Bank of Portland and the liquidation as hereinabove described. As to the supposed plans or proposals referred to in Paragraph 17 of the bill of complaint, this defendant says: [234]

First. No plan for the reorganization of defendant Bank as a state bank and trust company was ever developed or perfected so that it was possible of accomplishment. Such a plan was at one time suggested during the conferences with the Chief Bank Examiner hereinabove referred to, but it was rejected by defendant Bank and the Chief Bank Examiner in favor of the plan for transferring the frozen assets to a corporation to be organized with capital furnished by the stockholders of defendant Bank.

Second. So far as this defendant has ever been advised, J. E. Wheeler was never willing to turn over his assets for the protection of defendant Bank, or for the benefit of his creditors, until long after the closing of defendant Bank, although at one time said Wheeler made an indefinite proposal for an assignment provided defendant Bank would advance large additional sums of money. This defendant did not deter or in any way prevent or dissuade said Wheeler from any such transfer of assets, but, on the contrary, was at all times anxious and willing and often demanded that said Wheeler liquidate his property and assets in any way possible so that his indebtedness to defendant Bank might be paid.

Further answering Paragraph 17 of the bill of

complaint this defendant admits that the officers and directors of defendant Bank caused to be published, on March 2, 1927, the announcement quoted on page 22 of the bill, but it is not true that the directors of the Bank left the sole management and control to defendant Price or in any manner abdicated their responsibilities as directors. Nor is it true that the run on the Bank, which occurred almost four weeks later, was permitted by defendant Price or any of the then directors of the Bank, or that they refrained from doing everything in their power to prevent it.

The announcement so published on March 2, 1927, resulted from the fact that at that time the directors of defendant [235] Bank having been unable to carry through the plan for the organization of a corporation to take over nonproducing or frozen assets, decided that with the consent and approval of the Chief Bank Examiner, an assessment of 100% upon the capital stock of the Bank should be made, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7,696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000, and in addition guaranteed the payment of an additional sum of $1,000,000, in order to insure payment to defendant Bank of the full amount to accrue from said 100% assessment.

XVIII.

It is not the fact that any secret or undisclosed

agreements have been made as alleged in Paragraph 18 of the bill of complaint. The agreements said to have been placed in the custody of James B. Kerr are the agreements already referred to in this answer between defendant Bank and its guaranteeing stockholders on the one hand and the United States National Bank and the First National Bank of Portland on the other. Said agreements were not kept secret, but, on the contrary, were presented to and duly ratified at a meeting of the stockholders of defendant Bank held May 3, 1927, and said agreements were thereupon spread upon the minutes of the stockholders' meeting of May 3, 1927. At said meeting the shares of stock alleged in the bill to belong to complainant were represented by the proxy of the record owner, Francis P. Graves & Company, and said stock was duly voted at said meeting in favor of the ratification of said agreements, and the owner of said stock should be and is estopped from objecting to the making of said agreements.

XIX.

It is not the fact that the directors of defendant Bank made or caused losses to said Bank in two million dollars, or in [236] any sum, nor is it the fact that the directors impaired the capital stock of the Bank or wilfully or intentionally depreciated or destroyed any investment in the stock of the Bank.

XX.

It is not the fact that this defendant gave out or published improperly or carelessly or negligently

or unlawfully or at all any information about the internal affairs of the Bank. It is true that negotiations were had on one or more occasions for the sale and transfer to another bank of the assets, business, and good will of defendant Bank, and that the prospective purchaser was given such information about the properties offered for sale as was necessary to the negotiations. But the directors conducting such negotiations acted honestly and faithfully in the interest of defendant Bank and its stockholders, and at no time did they improperly disclose or make public the private affairs of the Bank or give out any information which in any way worked to the disadvantage of the Bank.

XXI.

This defendant is ready and willing to disclose any and all facts in his possession which may be relevant or pertinent to any issue herein. But all books and records of defendant Bank are, and at all times have been, open to and available for inspection by the stockholders of defendant Bank, but none of said books or records is in the possession of this answering defendant.

XXII.

This defendant admits that defendant Bank is now claiming that complainant is indebted to defendant Bank. Except as thus admitted this defendant specifically denies each and every allegation of Paragraph 22 of the bill of complaint.

Complainant is indebted to defendant Bank in the sum of $10,000, with accrued and accruing in-

terest. This indebtedness [237] complainant has for a number of years failed to pay, but has insisted upon renewals of his notes as they respectively matured. This defendant says that nothing in any of the matters attempted to be set out in complainant's bill justifies complainant's failure to pay his indebtedness to defendant Bank, but that defendant Bank should be permitted, notwithstanding complainant's demands herein, to enforce immediate payment by complainant of the principal and interest of his debt.

XXIII.

The answer made by this defendant to Paragraph 22 of the bill of complaint sufficiently answers Paragraph 23 of the bill. No accounting of any kind is due complainant from defendant Bank or from this defendant, and complainant should not be permitted to use the demands or claims asserted in his bill as an excuse for withholding payment of his overdue obligation to defendant Bank.

XXIV.

For answer to Paragraph 24 of the bill of complaint this defendant says that the bill is without equity. This defendant and defendant Bank have not at any time refrained, and are not now refraining, from any necessary or proper step for the redress of any wrong done to defendant Bank, but nothing in any of the matters attempted to be stated in the bill justifies the charge that this defendant has committed any wrong upon defendant Bank, and no stockholder, prior to the institution of a

suit brought by a stockholder, one Charles A. Burckhardt, simultaneously with the filing of this bill, has ever made any complaint to defendant Bank, or its directors, of any such wrong, nor has any demand ever been made for the redress of any such supposed wrong. [238]

This defendant denies that he now controls or ever has controlled the affairs of defendant Bank and avers that at all times in his actions as a director and as a stockholder he has been faithful in the performance of his duties as a director and faithful to the rights of the Bank and of its stockholders.

For a further and separate answer and by way of abatement of this suit, this defendant says that complainant is without right, authority, or qualification to bring this proceeding, and the proceeding should be abated and dismissed.

Complainant is not, and at the time of commencing this suit was not, a stockholder of defendant Bank. On October 18, 1926, complainant endorsed and transferred to Francis P. Graves & Company the stock in defendant Bank theretofore owned by him, and at this direction said stock was thereupon transferred upon the books of defendant Bank and new certificates therefor issued to the transferee. Since October 18, 1926, complainant has not been a stockholder in defendant Bank.

WHEREFORE, this defendant, having fully answered the bill of complaint herein, prays that

he be hence dismissed with costs and his disbursements herein taxed against complainant.

WINTER and MAGUIRE,
Attorneys for the Defendant.

_____,
Of Counsel. [239]

State of Oregon,
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 19th day of December, 1927, by receiving a copy thereof, duly certified to as such by Robert F. Maguire, attorney for defendant Charles K. Spaulding.

W. C. BRISTOL,
Attorney for Complainant.

Filed December 19, 1927. [240]

AND AFTERWARDS, to wit, on the 19th day of December, 1927, there was duly filed in said court, an answer of defendant Phil Metschan, in words and figures as follows, to wit: [241]

[Title of Court and Cause.]

ANSWER OF DEFENDANT PHIL METSCHAN.

Now comes the defendant, Phil Metschan and answering the bill of complaint herein, says:

I.

This answering defendant has no knowledge as

to the present residence or citizenship of complainant. At the time he became a stockholder in defendant Bank, and for a number of years thereafter, he was a citizen and resident of Oregon and this defendant is not advised as to the claimed present residence and citizenship and the diversity of citizenship asserted as a result thereof.

Defendant Chauncey McCormick is a resident and citizen of the State of Illinois.

Defendant The Northwestern National Bank is a national banking association organized under the banking laws of the United States and doing business in the city of Portland, Oregon.

Defendants O. L. Price, A. D. Charlton, E. S. Collins, Natt McDougall, Phil Metschan, Frederick F. Pittock, Mark Skinner, [242] Charles K. Spaulding, Charles H. Stewart and James F. Twohy are and for a number of years last past have been directors of defendant The Northwestern National Bank, and each was and is a citizen and resident of Oregon.

Defendant Charles A. Morden is a citizen and resident of Oregon, and he was at one time a director of defendant The Northwestern National Bank.

It is true that defendants O. L. Price and Charles A. Morden are trustees under the last will and testament of Henry L. Pittock, deceased, and that defendant Charles A. Morden is an officer of Oregonian Publishing Company, a corporation, but this defendant avers that neither of said facts is in any respect pertinent or material to any issue herein. This defendant believes that the reference

to said facts in complainant's bill is for some ulterior purpose and constitutes impertinence.

Defendant Emery Olmstead was, prior to March 1, 1927, president and a director of defendant Bank. On that day he was succeeded as such president by defendant O. L. Price, who theretofore had been chairman of the board of directors of defendant Bank.

II.

This defendant is unable to determine from the bill of complaint herein what amount, if any, is involved in this suit, and he leaves complainant to his proof of the allegation that a sum in excess of $3,000.00 is involved.

III.

This defendant is unable to determine from the bill of complaint herein whether the banking statutes referred to in Paragraph 3 of the bill are, as there asserted, a part of and involved with the subject matter of this suit, and denies that the laws referred to in Paragraph 3 of the bill are a part of [243] or involved in this suit.

IV.

It is not the fact that any wrongs have been committed against the defendant Bank for which the defendants, who are or were directors, have at any time been unwilling to seek redress. On the contrary, the defendants, who are and were directors, and each of them, at all times have been ready and willing, and now are ready and willing to sue and to call to account any and all persons or par-

ties in any manner responsible for wrongs to defendant Bank.

It is not the fact that before the filing of the bill of complaint herein any demand was made upon defendant Bank or upon the individual defendants as its directors, to correct or right the matters referred to as wrongs in the bill of complaint; on the contrary, neither complainant, nor any stockholder of defendant Bank has at any time made any complaint, charge, or statement to defendant Bank or any of its directors, that any such alleged wrongs had been suffered; nor has complainant or any stockholder ever demanded or requested that any step of any kind be taken to redress such supposed wrongs or to enforce any duties or liabilities of the individual defendants as directors of defendant Bank or otherwise.

Complainant is not in fact a stockholder of defendant Bank. As will be more fully stated hereinafter in this answer, complainant more than a year prior to the filing of this suit assigned and caused to be transferred to Francis P. Graves & Company, of Los Angeles, California, all of the shares of stock in defendant Bank then held by him, and since that time complainant has not been and is not now a stockholder of defendant Bank.

Complainant is not now and for more than a year prior to [244] the institution of this suit, has not been, a stockholder of defendant Bank, but if the allegations of Paragraph 4 of the bill of complaint are to be construed as asserting that the owner or owners of the stock formerly held by

complainant have not at all times enjoyed each and all of the rights vested in them as stockholders, this defendant denies the charge. The allegations that the individual defendants through majority control of stock were or are adverse or antagonistic to complainant or any stockholder, or were or are attempting through such control to carry out a plan designed to injure defendant Bank and its minority stockholders, and each and all of the statements and insinuations of the last subparagraph of Paragraph 4 of the bill of complaint, are without any foundation in fact and are untrue and are denied.

V.

This defendant denies that at any time in the entire history of defendant Bank there ever existed any such combination between the individual defendants for the control of the stock of defendant Bank as is alleged in Paragraph 5 of the bill of complaint or otherwise or at all. It is true that the estate of Henry L. Pittock, of which defendants O. L. Price and Charles A. Morden are trustees, is and for several years last past has been the owner of 7,696 shares out of the total 20,000 shares of stock outstanding, and that defendant O. L. Price individually owns 290 shares and that other individuals and corporations own and hold shares of stock substantially to the number stated in Paragraph 5 of the bill of complaint, except that defendant Charles A. Morden has not been the owner of any shares of stock in defendant Bank since the year 1922. But no combination or con-

federation for the domination through control of a majority of the stock of defendant Bank has ever existed between this defendant and any other director or stockholder. [245] As they have reference to this defendant the allegations of Paragraph 5 of the bill of complaint with respect to such combination and control are without foundation in fact and are untrue and are denied.

VI.

Complainant, Fred A. Ballin, became a stockholder of defendant Bank on July 29, 1918, by the acquisition of 100 shares and thereafter and on July 1, 1922, he acquired an additional 100 shares. He continued to be such stockholder until October 18, 1926, at which time all of said stock was assigned and transferred and new certificates issued therefor to Francis P. Graves & Company of Los Angeles, California.

The allegations of Paragraph 6 of the bill of complaint to the effect that representations were made to induce complainant to acquire stock in defendant Bank are not pertinent or material to any issue herein. If an answer thereto be required, this defendant says that he did not solicit complainant to acquire stock in defendant Bank, or make any representations to complainant, of the kind alleged, or otherwise, to induce him to become a stockholder.

VII.

The directors of defendant Bank, including this defendant, took the oath of office prescribed by law before entering upon the performance of their

duties as such directors; and this defendant says that he has in no manner violated said oath of office but that on the contrary he has faithfully and honestly assumed and performed the duties and obligations of his office as such director.

VIII.

It is not the fact that Henry L. Pittock in his lifetime, or the trustees of his estate after his death, or any other [246] persons or interests identified with them, dominated or controlled defendant Bank from its organization down to March 29, 1927, or at any time. No such combination for control ever existed, as this defendant has pointed out in his answer to Paragraph 5 of the bill of complaint. Henry L. Pittock in his lifetime, and the trustees of his estate after his death, at no time have exercised or attempted to exercise in or about the affairs of defendant Bank any other or greater rights than those lawfully vested in them as owners of stock of defendant Bank. This defendant avers that during all the time he was a director of the defendant Bank that he was independent of the domination or control of any person, persons or corporation, and that at all such times he acted independently as he deemed to be for the best interest of the Bank and all of its stockholders.

IX.

Increases of capital and surplus of defendant Bank were made in substantially the amounts and at about the times stated in paragraph 9 of the bill of complaint. It is true also, although the fact is

not pertinent or material to any issue herein, that at the time the capital was increased to $2,000,000 in 1922, the stockholders of defendant Bank, in order to strengthen its position and to offset inevitable and unavoidable losses due to the sudden deflation of values following the termination of the World War, also voluntarily paid in the sum of $500,000, $350,000 of which was credited to the earnings account, the remainder, $150,000, going to surplus, thereby increasing the surplus account from $250,000 to $400,000.

X.

This defendant is unable to determine the nature of the charge made against the defendants in paragraph 10 of the bill of complaint. He denies specifically that he in any manner or to [247] any extent whatsoever, caused, required or directed to be lost the sums listed in said paragraph or any sum, or any assets of said Bank.

Each of the persons and corporations listed in said paragraph is indebted to defendant Bank and in some instances a portion of such indebtedness has been charged to profit and loss. But in each case, excepting the case of McCormick Lumber Company, the indebtedness is the result of inability on the part of the borrowers to repay when due loans made in the ordinary course of business at times and under circumstances such that this individual defendant was in no manner at fault in the extension of credit. In large part these loans were made prior to the year 1920, to borrowers then financially responsible and in most instances supported by

collateral entirely adequate at the time in value, and the inability of the borrowers to repay the loans when due resulted from the sudden and unexpected drop in merchandise and other values following the cessation of the World War. Since that time the officers of defendant Bank have been active and diligent in their efforts to collect said loans and substantial recoveries have been made and are still being made.

All loans made by defendant Bank to McCormick Lumber Company have been paid in full. The indebtedness now owing by said Lumber Company is the result of the acceptance by defendant Bank for credit to the account of the McCormick Lumber Company of certain checks and drafts, payment of which was later refused by the drawees. The acceptance of these checks and drafts for immediate credit was without the knowledge of this defendant and he had no notice thereof or opportunity whatever of preventing such crediting of checks or drafts, and he is in no respect chargeable with negligence or fault in respect thereto.

It is not the fact that this defendant in 1925 or at any time failed, neglected or refused to comply with any direction of any Bank Examiner or other representative of the [248] Comptroller of the Currency to reduce the line of credit granted to J. E. Wheeler or to any companies in which he was interested. All present indebtedness due from said Wheeler, Wheeler Timber Company, Wheeler Estate and Telegram Publishing Company, is the result of loans made several years prior to 1925

upon a sufficient showing of financial worth and supported in large part by adequate guaranties and/or collateral. Renewals of said loans were made from time to time when the borrowers were unable to pay at maturity, but it is not true that the Examiner of National Banks required the so-called Wheeler lines to be reduced because too much was loaned to one person, and such renewals were never granted in disobedience to any direction or against the advice of any Bank Examiner or other representative of the Comptroller of the Currency.

Further answering Paragraph 10 of the bill of complaint defendant says that he became a director of the defendant Bank on the 13th day of January, 1920. If complainant's bill is intended as a charge that losses were made in the amounts stated in Paragraph 10 because of improper loans, this defendant says that he was not a director when the loans were made and the loss resulting therefrom, if any, accrued before he assumed office; and since his assumption of office no act or omission on his part has increased or affected the amount of loss, if any, attributable to such loans.

XI.

The allegations of Paragraph 11 of the bill of complaint are untrue and are denied. Defendant Charles A. Morden was elected a director of defendant Bank on January 11, 1921, and served as such director until August 31, 1922, when he resigned, having sold his stock for a valuable consideration to defendant Mark Skinner. Defendant

Morden served as a member of the Examining Committee from the time of his election as a [249] director until the end of the year 1921 only. During this period the Examining Committee made regular reports to the directors and such reports were regularly spread upon the minutes of the meetings of the board of directors. But it is not the fact that said reports or any of them showed any condition of wrong administration or impending losses or any condition in the affairs of the defendant Bank requiring action by the directors to avoid loss. During this period and at all times the directors met regularly and carefully reviewed the reports of the Examining Committee and took such action in respect thereto as in the exercise of sound judgment seemed necessary. No reports were suppressed and nothing in the condition of the Bank was ever kept from the stockholders, and it is untrue that defendant Morden resigned as a director because of any such undisclosed condition in the affairs of the Bank.

It is untrue that at any time during the existence of the defendant Bank its Examining Committee made any report which would show a favorable but incorrect condition of the Bank or any report which showed any condition of said Bank except the true condition thereof as said Examining Committee found and believed to exist and attempted to disclose by its reports. All reports of the Examining Committee were made to the board of directors of the Bank only and were thereupon placed with the minutes of the meetings of the directors, at which said

reports were received, and thereupon all of said reports became available for examination by all stockholders of the Bank and by the District Bank Examiner and any other representative of the Comptroller of the Currency. All reports of the Examining Committee remained at all times and now remain in the minutes of the directors' meetings and were in fact read and their contents known to and understood by the District Bank Examiner, and could have been read and their contents known to and understood [250] by any stockholder of the Bank or any representative of the Comptroller of the Currency.

It is untrue that the Examining Committee ever made a confidential, private or secret report, or any report, to Mark Skinner, vice-president, or to other officers or directors of the Bank, which showed any condition different from that disclosed by any report made to the District Bank Examiner, or to the Comptroller of the Currency, but whether the Comptroller of the Currency in person received copies of all reports made by the Examining Committee to the board of directors, defendant cannot say, although he avers that copies of such reports of the Examining Committee were sent to the Comptroller of the Currency whenever requested.

XII.

This defendant is unable to determine what is attempted to be alleged in Paragraph 12 of the bill of complaint. Pursuant to the requirements of the by-laws of defendant Bank there was at all

times an executive committee consisting of a majority of the board of directors, which committee met weekly and passed on applications for credit and kept fully informed in regard to the purchase and sales of securities, loans on collateral, discounts and other business activities of defendant Bank. Regular monthly meetings of the board of directors were held at which the minutes of meetings of the Executive Committee were regularly read and submitted for approval.

There was also maintained at all times, in accordance and the by-laws of defendant Bank, an Examining Committee whose duty it was to investigate the affairs and business of defendant Bank twice in each year, and said committee during all of said times carefully investigated the affairs of defendant Bank and reported the results of such investigations to the board of [251] directors; and this defendant alleges that throughout the period mentioned in the complaint every effort was made by him with respect to all matters coming within the scope of his office or duty as a director to supervise and manage the affairs and business of defendant Bank faithfully and honestly.

On October 22, 1926, the Chief National Bank Examiner of the Twelfth Federal Reserve District advised Defendant Bank by letter of the result of an examination of its assets and stated that it would be necessary to provide additional funds to the amount of not less than $1,000,000 in order that nonproducing assets in this total could be eliminated. Thereafter this defendant with other defendants,

acting with the approval of said Bank Examiner, undertook the organization of a corporation capitalized at $1,500,000, one-half thereof to be provided by the stockholders of defendant Bank, each stockholder subscribing $37.50 for each share of bank stock held by him, said new corporation to purchase and take over from defendant Bank nonproducing or "frozen" assets, as described in the report of said Bank Examiner. Such acting defendants made every effort to consummate said plan but were unable to do so. But thereafter, following a further examination by said Bank Examiner, it was determined to be necessary to levy a full 100% assessment upon the stockholders of defendant Bank, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7,696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000 and in addition guaranteed the payment of an additional sum of $1,000,000 in order to insure payment to the Bank of the full amount to accrue from said 100% assessment.

The allegation that acts or omissions of this defendant [252] as a director or otherwise caused the defendant Bank to go into liquidation is untrue. Except as hereinabove in this answer to Paragraph 12 admitted, this defendant specifically denies each and every allegation of said Paragraph 12.

XIII.

It is not the fact that at any time this defendant

suppressed or concealed from stockholders any information regarding the condition of the Bank and it is not true that stockholders' meetings were in any respect manipulated or controlled by this defendant or by any person in combination with him. No such combination among stockholders as is alleged in paragraph 13 of the bill existed.

XIV.

The allegations of Paragraph 14 of the bill of complaint are untrue. This defendant did not participate in any way in the acquisition of stock in defendant Bank by J. E. Wheeler, or aid him in any particular in securing credit for, or in the financing of his purchase of said stock. On the contrary, said purchase by J. E. Wheeler of stock theretofore owned by Guy M. Standifer, L. B. Menefee and R. V. Jones was consummated without the knowledge or consent of this defendant.

XV.

The allegations of Paragraph 15 of the bill of complaint are untrue. This defendant at no time prevented or attempted to prevent or refused to allow the Telegram Publishing Company or J. E. Wheeler to sell the newspaper published by said Company. On the contrary, this defendant at all times after said J. E. Wheeler failed to pay his indebtedness to defendant Bank when due, urged that said Wheeler be required, so far as defendant Bank could so require it, to sell sufficient of his assets to enable him to repay his indebtedness to defendant Bank. [253] Defendants Metschan, Spaulding,

Charlton, Collins and Price, as directors, and defendant Morden, who was not a director, in 1925 or 1926, neither had nor attempted to exercise at any time any right to prevent the sale of the newspaper published by the Telegram Publishing Company, but at all such times said defendants, excluding defendant Morden, who was not then a director, urged upon the officers of defendant Bank that said Wheeler be required to make sales whenever possible and liquidate his indebtedness to defendant Bank.

XVI.

The allegations of Paragraph 16 of the bill of complaint are untrue. This defendant was fully aware in 1925 and 1926 of the extent to which the assets of defendant Bank were nonproductive or frozen, and at all times during said years, and during the preceding years, had striven faithfully and honestly to convert said frozen assets into bankable productive commercial paper.

In June, 1926, a committee appointed by the directors, consisting of defendants Price, Metschan and Stewart, conferred with the Comptroller of the Currency and requested him to have an examination made of the condition of the Bank so that with the approval of the Comptroller, or his representative, steps could be taken for the elimination of all nonproductive or frozen assets. Thereafter such an examination was made and other conferences were held with the Chief Bank Examiner of the Twelfth Federal Reserve District and the Comptroller, and thereafter and in December, 1926, with the ap-

proval of the Chief Bank Examiner and the Comptroller, defendant Bank and its directors determined to organize a corporation with a capital of $1,500,000, one-half thereof to be provided by the stockholders of defendant Bank, each stockholder subscribing [254] $57.50 for each share of Bank stock held by him, said new corporation to purchase and take over from defendant Bank nonproducing or frozen assets as designated in the reports of the Chief Bank Examiner.

This defendant and other defendants made every effort to consummate said plan but were unable to do so, and when it was ascertained that said plan could not be successfully carried through, it was determined to be necessary to levy a full 100% assessment upon the stockholders of defendant Bank, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7,696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000 and in addition guaranteed the payment of an additional sum of $1,000,000 in order to insure payment to the Bank of the full amount to accrue from said 100% assessment.

This defendant at no time failed or refused to comply with any direction or request of the Comptroller of the Currency. On the contrary, he at all times worked in co-operation with him, in the effort to formulate and carry out a plan for the elimination of all nonproducing or frozen assets.

It is not the fact that during 1926, or 1927, as alleged in Paragraph 16 of the bill of complaint, any further loans were made or credit extended to J. E. Wheeler, either directly or upon his endorsement. On the contrary, these individual defendants, for a long time prior thereto, were endeavoring in every way within their power as directors, to secure the retirement, in part at least, of the indebtedness owing by said J. E. Wheeler and the companies in which he was interested.

No loans in excess of the amounts permitted by law were ever made by these defendants to J. E. Wheeler or to companies in [255] which he was interested or to any other persons, firms or corporations.

XVII.

The allegations of Paragraph 17 of the bill of complaint are untrue. Defendant Bank was never in a condition such that it was unable to pay its depositors upon demand until on March 28, 1927, a run upon the Bank occurred. Whereupon defendant Bank, in order to insure full and immediate payment to all depositors on demand, entered into a contract with United States National Bank and First National Bank of Portland under the terms of which said two Banks agreed to advance and loan to defendant Bank all moneys necessary to enable defendant Bank to pay its depositors on demand, defendant Bank pledging to said two Banks all of its assets as collateral to said loan and in addition certain of its stockholders, including the Estate of Henry L. Pittock, individually guaranteeing repayment of said loan; and thereupon defend-

ant Bank began liquidation of its assets in order to effect the payment of said loan to said two Banks.

Defendant O. L. Price was elected president of defendant Bank on March 1, 1927, but it is not the fact that thereafter the management of the Bank was left entirely to defendant Price, or that this defendant in any respect, or to any degree, delegated any of his duties as director to the president of the Bank, or to anyone else. And it is not true that in February, 1927, or in March, 1927, or at any other time, the directors, by the adoption of any plans or proposals before them could have avoided the condition which made necessary in their judgment the agreement with United States National Bank and First National Bank of Portland and the liquidation as hereinabove described. As to the supposed plans or proposals referred to in Paragraph 17 of the bill of complaint, this defendant says: [256]

First. No plan for reorganization of defendant Bank as a state Bank and trust company was ever developed or perfected so that it was possible of accomplishment. Such a plan was at one time suggested during the conferences with the Chief Bank Examiner hereinabove referred to, but it was rejected by defendant Bank and the Chief Bank Examiner in favor of the plan for transferring the frozen assets to a corporation to be organized with capital furnished by the stockholders of defendant Bank.

Second. So far as this defendant has ever been advised, J. E. Wheeler was never willing to turn over his assets for the protection of defendant Bank,

or for the benefit of his creditors, until long after the closing of defendant Bank, although at one time said Wheeler made an indefinite proposal for an assignment provided defendant Bank would advance large additional sums of money. This defendant did not deter or in any way prevent or dissuade said Wheeler from any such transfer of assets, but, on the contrary, was at all times anxious and willing and often demanded that said Wheeler liquidate his property and assets in any way possible so that his indebtedness to defendant Bank might be paid.

Further answering Paragraph 17 of the bill of complaint this defendant admits that the officers and directors of defendant Bank caused to be published, on March 2, 1927, the announcement quoted on page 22 of the bill, but it is not true that the directors of the Bank left the sole management and control to defendant Price or in any manner abdicated their responsibilities as directors. Nor is it true that the run on the Bank, which occurred almost four weeks later, was permitted by defendant Price or any of the then directors of the Bank, or that they refrained from doing everything in their power to prevent it.

The announcement so published on March 2, 1927, resulted from the fact that at that time the directors of defendant [257] Bank having been unable to carry through the plan for the organization of a corporation to take over nonproducing or frozen assets, decided that with the consent and approval of the Chief Bank Examiner, an assessment of 100% upon the capital stock of the Bank should

be made, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7,696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000, and in addition guaranteed the payment of an additional sum of $1,000,000, in order to insure payment to defendant Bank of the full amount to accrue from said 100% assessment.

XVIII.

It is not the fact that any secret or undisclosed agreements have been made as alleged in Paragraph 18 of the bill of complaint. The agreements said to have been placed in the custody of James B. Kerr are the agreements already referred to in this answer between defendant Bank and its guaranteeing stockholders on the one hand and the United States National Bank and the First National Bank of Portland on the other. Said agreements were not kept secret, but, on the contrary, were presented to and duly ratified at a meeting of the stockholders of defendant Bank held May 3, 1927, and said agreements were thereupon spread upon the minutes of the stockholders' meeting of May 3, 1927. At said meeting the shares of stock alleged in the bill to belong to complainant were represented by the proxy of the record owner, Francis P. Graves & Company, and said stock was duly voted at said meeting in favor of the ratification of said agreements, and the owner of said stock should be and is

estopped from objecting to the making of said agreements.

XIX.

It is not the fact that the directors of defendant Bank made or caused losses to said Bank in two million dollars, or in [258] any sum, nor is it the fact that the directors impaired the capital stock of the Bank or wilfully or intentionally depreciated or destroyed any investment in the stock of the Bank.

XX.

It is not the fact that this defendant gave out or published improperly or carelessly or negligently or unlawfully or at all any information about the internal affairs of the Bank. It is true that negotiations were had on one or more occasions for the sale and transfer to another bank of the assets, business, and goodwill of defendant Bank, and that the prospective purchaser was given such information about the properties offered for sale as was necessary to the negotiations. But the directors conducting such negotiations acted honestly and faithfully in the interest of defendant Bank and its stockholders, and at no time did they improperly disclose or make public the private affairs of the Bank or give out any information which in any way worked to the disadvantage of the Bank.

XXI.

This defendant is ready and willing to disclose any and all facts in his possession which may be relevant or pertinent to any issue herein. But all books and records of defendant Bank are, and at all

times have been, open to and available for inspection by the stockholders of defendant Bank, but none of said books or records is in the possession of this answering defendant.

XXII.

This defendant admits that defendant Bank is now claiming that complainant is indebted to defendant Bank. Except as thus admitted this defendant specially denies each and every allegation of Paragraph 22 of the bill of complaint.

Complainant is indebted to defendant Bank in the sum of $10,000, with accrued and accruing interest. This indebtedness [259] complainant has for a number of years failed to pay, but has insisted upon renewals of his notes as they respectively matured. This defendant says that nothing in any of the matters attempted to be set out in complainant's bill justifies complainant's failure to pay his indebtedness to defendant Bank, but that defendant Bank should be permitted, notwithstanding complainant's demands herein, to enforce immediate payment by complainant of the principal and interest of his debt.

XXIII.

The answer made by this defendant to Paragraph 22 of the bill of complaint sufficiently answers Paragraph 23 of the bill. No accounting of any kind is due complainant from defendant Bank or from this defendant, and complainant should not be permitted to use the demands or claims asserted in his bill as an excuse for withholding payment of his overdue obligation to defendant Bank.

XXIV.

For answer to Paragraph 24 of the bill of complaint this defendant says that the bill is without equity. This defendant and defendant Bank have not at any time refrained, and are not now refraining, from any necessary or proper step for the redress of any wrong done to defendant Bank, but nothing in any of the matters attempted to be stated in the bill justifies the charge that this defendant has committed any wrong upon defendant Bank, and no stockholder, prior to the institution of a suit brought by a stockholder, one Charles A. Burckhardt, simultaneously with the filing of this bill, has ever made any complaint to defendant Bank, or its directors, of any such wrong, nor has any demand ever been made for the redress of any such supposed wrong. [260]

This defendant denies that he now controls or ever has controlled the affairs of defendant Bank and avers that at all times in his actions as a director and as a stockholder he has been faithful in the performance of his duties as a director and faithful to the rights of the Bank and of its stockholders.

For a further and separate answer and by way of abatement of this suit, this defendant says that complainant is without right, authority, or qualification to bring this proceeding, and the proceeding should be abated and dismissed.

Complainant is not, and at the time of commencing this suit was not, a stockholder of defendant Bank. On October 18, 1926, complainant endorsed

and transferred to Francis P. Graves & Company the stock in defendant Bank theretofore owned by him, and at his direction said stock was thereupon transferred upon the books of defendant Bank and new certificates therefor issued to the transferee Since October 18, 1926, complainant has not been a stockholder in defendant Bank.

WHEREFORE, this defendant, having fully answered the bill of complaint herein, prays that he be hence dismissed with costs and his disbursements herein taxed against complainant.

DEY, HAMPSON & NELSON,
Attorneys for the Defendant.

ALFRED A. HAMPSON,
Of Counsel. [261]

State of Oregon,
County of Multnomah,—ss.

I, Phil Metschan, make solemn oath and say: I am the defendant named in and makes the foregoing answer; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge, and so much thereof as concerns the acts and deeds of any other person or persons I believe to be true.

PHIL METSCHAN,

Subscribed and sworn to before me this 19th day of December, 1927.

[Seal] ALFRED A. HAMPSON,
Notary Public for Oregon.

My commission expires August 22, 1928.

State of Oregon,
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 19th day of December, 1927, by receiving a copy thereof, duly certified to as such by Alfred A. Hampson, of attorneys for defendant Phil Metschan.

W. C. BRISTOL,
Attorney for Plaintiff.

Filed December 19, 1927. [262]

AND AFTERWARDS, to wit, on the 19th day of December, 1927, there was duly filed in said court, an answer of Charles A. Morden, in words and figures as follows, to wit: [263]

[Title of Court and Cause.]

ANSWER OF DEFENDANT CHARLES A. MORDEN.

Now comes the defendant, Charles A. Morden, and answering the bill of complaint herein, says:

I.

This answering defendant has no knowledge as to the present residence or citizenship of complainant. At the time he became a stockholder in defendant Bank, and for a number of years thereafter, he was a citizen and resident of Oregon and this defendant is not advised as to the claimed

present residence and citizenship and the diversity of citizenship asserted as a result thereof.

Defendant Chauncey McCormick is a resident and citizen of the State of Illinois.

Defendant The Northwestern National Bank is a national banking association organized under the banking laws of the United States and doing business in the city of Portland, Oregon.

Defendants O. L. Price, A. D. Charlton, E. S. Collins, Natt McDougall, Phil Metschan, Frederick F. Pittock, Mark Skinner, [264] Charles K. Spaulding, Charles H. Stewart and James F. Twohy are and for a number of years last past have been directors of defendant The Northwestern National Bank, and each was and is a citizen and resident of Oregon.

Defendant Charles A. Morden is a citizen and resident of Oregon, and he was at one time a director of defendant The Northwestern National Bank.

It is true that defendants O. L. Price and Charles A. Morden are trustees under the last will and testament of Henry J Pittock, deceased, and that defendant Charles A. Morden is an officer of Oregonian Publishing Company, a corporation, but this defendant avers that neither of said facts is in any respect pertinent or material to any issue herein. This defendant believes that the reference to said facts in complainant's bill is for some ulterior purpose and constitutes impertinence.

Defendant Emery Olmstead was, prior to March 1, 1927, president and a director of defendant Bank. On that day he was succeeded as such president by

defendant O. L. Price, who theretofore had been chairman of the board of directors of defendant Bank.

II.

This defendant is unable to determine from the bill of complaint herein what amount, if any, is involved in this suit, and he leaves complainant to his proof of the allegation that a sum in excess of $3,000.00 is involved.

III.

This defendant is unable to determine from the bill of complaint herein whether the banking statutes referred to in Paragraph 3 of the bill are, as there asserted, a part of and involved with the subject matter of this suit, and denies that the laws referred to in Paragraph 3 of the bill are a part of [265] or involved in this suit.

IV.

It is not the fact that any wrongs have been committed against the defendant Bank for which the defendants, who are or were directors, have at any time been unwilling to seek redress. On the contrary, the defendants, who are and were directors, and each of them, at all times have been ready and willing, and now are ready and willing to sue and to call to account any and all persons or parties in any manner responsible for wrongs to defendant Bank.

It is not the fact that before the filing of the bill of complaint herein any demand was made upon defendant Bank or upon the individual defendants as its directors, to correct or right the matters referred to as wrongs in the bill of complaint; on the contrary, neither complainant, nor any stock-

holder of defendant Bank has at any time made any complaint, charge, or statement to defendant Bank or any of its directors, that any such alleged wrongs had been suffered; nor has complainant or any stockholder ever demanded or requested that any step of any kind be taken to redress such supposed wrongs or to enforce any duties or liabilities of the individual defendants as directors of defendant Bank or otherwise.

Complainant is not in fact a stockholder of defendant Bank. As will be more fully stated hereinafter in this answer, complainant more than a year prior to the filing of this suit assigned and caused to be transferred to Francis P. Graves & Company, of Los Angeles, California, all of the shares of stock in defendant Bank then held by him, and since that time complainant has not been and is not now a stockholder of defendant Bank.

Complainant is not and for more than a year prior to [266] the institution of this suit, has not been, a stockholder of defendant Bank, but if the allegations of Paragraph 4 of the bill of complaint are to be construed as asserting that the owner or owners of the stock formerly held by complainant have not at all times enjoyed each and all of the rights vested in them as stockholders, this defendant denies the charge. The allegations that the individual defendants through majority control of stock were or are adverse or antagonistic to complainant or any stockholder, or were or are attempting through such control to carry out a plan designed to injure defendant Bank and its minority stockholders, and each and all of the statements

and insinuations of the last subparagraph of Paragraph 4 of the bill of complaint, are without any foundation in fact and are untrue and are denied.

V.

This defendant denies that at any time in the entire history of defendant Bank there ever existed any such combination between the individual defendants for the control of the stock of defendant Bank as is alleged in Paragraph 5 of the bill of complaint or otherwise or at all. It is true that the estate of Henry L. Pittock, of which defendants O. L. Price and Charles A. Morden are trustees, is and for several years last past has been the owner of 7,696 shares out of the total 20,000 shares of stock outstanding, and that defendant O. L. Price individually owns 290 shares and that other individuals and corporations own and hold shares of stock substantially to the number stated in Paragraph 5 of the bill of complaint, except that defendant Charles A. Morden has not been the owner of any shares of stock in defendant Bank since the year 1922. But on combination or confederation for the domination through control of a majority of the stock of defendant Bank has ever existed between this defendant and any other director or stockholder. [267] As they have reference to this defendant the allegations of Paragraph 5 of the bill of complaint with respect to such combination and control are without foundation in fact and are untrue and are denied.

VI.

Complainant, Fred A. Ballin, became a stock-

holder of defendant Bank on July 29, 1918, by the acquisition of 100 shares and thereafter and on July 1, 1922, he acquired an additional 100 shares. He continued to be such stockholder until October 18, 1926, at which time all of said stock was assigned and transferred and new certificates issued therefor to Francis P. Graves & Company of Los Angeles, California.

The allegations of Paragraph 6 of the bill of complaint to the effect that representations were made to induce complainant to acquire stock in defendant Bank are not pertinent or material to any issue herein. If an answer thereto be required, this defendant says that he did not solicit complainant to acquire stock in defendant Bank, or make any representation to complainant, of the kind alleged, or otherwise, to induce him to become a stockholder.

VII.

The directors of defendant Bank, including this defendant, took the oath of office prescribed by law before entering upon the performance of their duties as such directors; and this defendant says that he has in no manner violated said oath of office but that on the contrary he has faithfully and honestly assumed and performed the duties and obligations of his office as such director.

VIII.

It is not the fact that Henry L. Pittock in his lifetime, or the trustees of his estate after his death, or any other [268] persons or interests identified with them, dominated or controlled defendant Bank

from its organization down to March 29, 1927, or at any time. No such combination for control ever existed, as this defendant has pointed out in his answer to Paragraph 5 of the bill of complaint. Henry L. Pittock in his lifetime, and the trustees of his estate after his death, at no time have exercised or attempted to exercise in or about the affairs of defendant Bank any other or greater rights than those lawfully vested in them as owners of stock of defendant Bank. This defendant avers that during all the time he was a director of the defendant Bank that he was independent of the domination or control of any person, persons or corporation, and that at all such times he acted independently as he deemed to be for the best interests of the Bank and all of its stockholders.

IX.

Increases of capital and surplus of defendant Bank were made in substantially the amounts and at about the times stated in Paragraph 9 of the bill of complaint. It is true also, although the fact is not pertinent or material to any issue herein, that at the time the capital was increased to $2,000,000 in 1922, the stockholders of defendant Bank, in order to strengthen its position and to offset inevitable and unavoidable losses due to the sudden deflation of values following the termination of the World War, also voluntarily paid in the sum of $500,000, $350,000 of which was credited to the earnings account, the remainder, $150,000, going to surplus, thereby increasing the surplus account from $250,000 to $400,000.

X.

This defendant is unable to determine the nature of the charge made against the defendants in Paragraph 10 of the bill of complaint. He denies specifically that he in any manner or to [269] any extent whatsoever, caused, required or directed to be lost the sums listed in said paragraph or any sum, or any assets of said Bank.

Each of the persons and corporations listed in said paragraph is indebted to defendant Bank and in some instances a portion of such indebtedness has been charged to profit and loss. But in each case, excepting the case of McCormick Lumber Company, the indebtedness is the result of inability on the part of the borrowers to repay when due loans made in the ordinary course of business at times and under circumstances such that this individual defendant was in no manner at fault in the extension of credit. In large part these loans were made prior to the year 1920, to borrowers then financially responsible and in most instances supported by collateral entirely adequate at the time in value, and the inability of the borrowers to repay the loans when due resulted from the sudden and unexpected drop in merchandise and other values following the cessation of the World War. Since that time the officers of defendant Bank have been active and diligent in their efforts to collect said loans and substantial recoveries have been made and are still being made.

All loans made by defendant Bank to McCormick Lumber Company have been paid in full. The indebtedness now owing by said Lumber Company is

the result of the acceptance by defendant Bank for credit to the account of the McCormick Lumber Company of certain checks and drafts, payment of which was later refused by the drawees. The acceptance of these checks and drafts for immediate credit was without the knowledge of this defendant and he had no notice thereof or opportunity whatever of preventing such crediting of checks or drafts, and he is in no respect chargeable with negligence or fault in respect thereto.

It is not the fact that this defendant in 1925 or at any time failed, neglected or refused to comply with any direction of any Bank Examiner or other representative of the [270] Comptroller of the Currency to reduce the line of credit granted to J. E. Wheeler or to any companies in which he was interested. All present indebtedness due from said Wheeler, Wheeler Timber Company, Wheeler Estate and Telegram Publishing Company, is the result of loans made several years prior to 1925 upon a sufficient showing of financial worth and supported in large part by adequate guarantees and/or collateral. Renewals of said loans were made from time to time when the borrowers were unable to pay at maturity, but it is not true that the Examiner of National Banks required the so-called Wheeler lines to be reduced because too much was loaned to one person, and such renewals were never granted in disobedience to any direction or against the advice of any Bank Examiner or other representative of the Comptroller of the Currency.

Further answering Paragraph 10 of the bill of complaint defendant says that he became a director

of the defendant Bank on the —— day of ——, 192—. If complainant's bill is intended as a charge that losses were made in the amounts stated in Paragraph 10 because of improper loans, this defendant says that he was not a director when the loans were made and the loss resulting therefrom, if any, accrued before he assumed office; and since his assumption of office no act or omission on his part has increased or affected the amount of loss, if any, attributable to such loans.

XI.

The allegations of Paragraph 11 of the bill of complaint are untrue and are denied. Defendant Charles A. Morden was elected a director of defendant Bank on January 11, 1921, and served as such director until August 31, 1922, when he resigned, having sold his stock for a valuable consideration to defendant Mark Skinner. Defendant Morden served as a member of the Examining Committee from the time of his election as a [271] director until the end of the year 1921 only. During this period the Examining Committee made regular reports to the directors and such reports were regularly spread upon the minutes of the meetings of the board of directors. But it is not the fact that said reports or any of them showed any condition of wrong administration or impending losses or any condition in the affairs of the defendant Bank requiring action by the directors to avoid loss. During this period and at all times the directors met regularly and carefully reviewed the reports of the Examining Committee and took

such action in respect thereto as in the exercise of sound judgment seemed necessary. No reports were suppressed and nothing in the condition of the Bank was ever kept from the stockholders, and it is untrue that defendant Morden resigned as a director because of any such undisclosed condition in the affairs of the Bank.

It is untrue that at any time during the existence of the defendant Bank its Examining Committee made any report which would show a favorable but incorrect condition of the Bank or any report which showed any condition of said Bank except the true condition thereof as said Examining Committee found and believed to exist and attempted to disclose by its reports. All reports of the Examining Committee were made to the board of directors of the Bank only and were thereupon placed with the minutes of the meetings of the directors, at which said reports were received, and thereupon all of said reports became available for examination by all stockholders of the Bank and by the District Bank Examiner and any other representative of the Comptroller of the Currency. All reports of the Examining Committee remained at all times and now remain in the minutes of the directors' meetings and were in fact read and their contents known to and understood by the District Bank Examiner, and could have been read and their contents known to and understood [272] by any stockholder of the Bank or any representative of the Comptroller of the Currency.

It is untrue that the Examining Committee ever

made a confidential, private or secret report, or any report, to Mark Skinner, vice-president, or to other officers or directors of the Bank, which showed any condition different from that disclosed by any report made to the District Bank Examiner, or to the Comptroller of the Currency, but whether the Comptroller of the Currency in person received copies of all reports made by the Examining Committee to the board of directors, defendant cannot say, although he avers that copies of such reports of the Examining Committee were sent to the Comptroller of the Currency whenever requested.

XII.

This defendant is unable to determine what is attempted to be alleged in Paragraph 12 of the bill of complaint. Pursuant to the requirements of the by-laws of defendant Bank there was at all times an executive committee consisting of a majority of the board of directors, which committee met weekly and passed on applications for credit and kept fully informed in regard to the purchase and sales of securities, loans on collateral, discounts and other business activities of defendant Bank. Regular monthly meetings of the board of directors were held at which the minutes of meetings of the executive committee were regularly read and submitted for approval.

There was also maintained at all times, in accordance with the by-laws of defendant Bank, an examining committee whose duty it was to investigate the affairs and business of defendant Bank twice in each year, and said committee during all of said

times carefully investigated the affairs of defendant Bank and reported the results of such investigations to the board of [273] directors; and this defendant alleges that throughout the period mentioned in the complaint every effort was made by him with respect to all matters coming within the scope of his office or duty as a director to supervise and manage the affairs and business of defendant Bank faithfully and honestly.

On October 22, 1926, the Chief National Bank Examiner of the Twelfth Federal Reserve District advised defendant Bank by letter of the result of an examination of its assets and stated that it would be necessary to provide additional funds to the amount of not less than $1,000,000 in order that nonproducing assets in this total could be eliminated. Thereafter this defendant with other defendants, acting with the approval of said Bank Examiner, undertook the organization of a corporation capitalized at $1,500,000, one-half thereof to be provided by the stockholders of defendant Bank, each stockholder subscribing $37.50 for each share of bank stock held by him, said new corporation to purchase and take over from defendant Bank nonproducing or "frozen" assets, as described in the report of said Bank Examiner. Such acting defendants made every effort to consummate said plan but were unable to do so. But thereafter, following a further examination by said Bank Examiner, it was determined to be necessary to levy a full 100% assessment upon the stockholders of defendant Bank, whereupon certain stockholders, including the Es-

tate of Henry L. Pittock, holding 7,696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000 and in addition guaranteed the payment of an additional sum of $1,000,000 in order to insure payment to the Bank of the full amount to accrue from said 100% assessment.

The allegation that acts or omissions of this defendant [274] as a director or otherwise caused the defendant Bank to go into liquidation is untrue. Except as hereinabove in this answer to Paragraph 12 admitted, this defendant specifically denies each and every allegation of said Paragraph 12.

XIII.

It is not the fact that at any time this defendant suppressed or concealed from stockholders any information regarding the condition of the Bank and it is not true that stockholders' meetings were in any respect manipulated or controlled by this defendant or by any person in combination with him. No such combination among stockholders as is alleged in Paragraph 13 of the bill existed.

XIV.

The allegations of Paragraph 14 of the bill of complaint are untrue. This defendant did not participate in any way in the acquisition of stock in defendant Bank by J. E. Wheeler, or aid him in any particular in securing credit for, or in the financing

of his purchase of said stock. On the contrary, said purchase by J. E. Wheeler of stock theretofore owned by Guy M. Standifer, L. B. Menefee and R. V. Jones was consummated without the knowledge or consent of this defendant.

XV.

The allegations of Paragraph 15 of the bill of complaint are untrue. This defendant at no time prevented or attempted to prevent or refused to allow the Telegram Publishing Company or J. E. Wheeler to sell the newspaper published by said Company. On the contrary, this defendant at all times after said J. E. Wheeler failed to pay his indebtedness to defendant Bank when due, urged that said Wheeler be required, so far as defendant Bank could so require it, to sell sufficient of his assets to enable him to repay his indebtedness to defendant Bank. [275] Defendants Metschan, Spaulding, Charlton, Collins and Price, as directors, and defendant Morden, who was not a director, in 1925 or 1926, neither had nor attempted to exercise at any time any right to prevent the sale of the newspaper published by the Telegram Publishing Company, but at all such times said defendants, excluding defendant Morden, who was not then a director, urged upon the officers of defendant Bank that said Wheeler be required to make sales whenever possible and liquidate his indebtedness to defendant Bank.

XVI.

The allegations of Paragraph 16 of the bill of

complaint are untrue. This defendant was fully aware in 1925 and 1926 of the extent to which the assets of defendant Bank were nonproductive or frozen, and at all times during said years, and during the preceding years, had striven faithfully and honestly to convert said frozen assets into bankable productive commercial paper.

In June, 1926, a committee appointed by the directors, consisting of defendants Price, Metschan and Stewart, conferred with the Comptroller of the Currency and requested him to have an examination made of the condition of the Bank so that with the approval of the Comptroller, or his representative, steps could be taken for the elimination of all nonproductive or frozen assets. Thereafter such an examination was made and other conferences were held with the Chief Bank Examiner of the Twelfth Federal Reserve District and the Comptroller, and thereafter and in December, 1926, with the approval of the Chief Bank Examiner and the Comptroller, defendant Bank and its directors determined to organize a corporation with a capital of $1,500,000, one-half thereof to be provided by the stockholders of defendant Bank, each stockholder subscribing [276] $57.50 for each share of bank stock held by him, said new corporation to purchase and take over from defendant Bank nonproducing or frozen assets as designated in the reports of the Chief Bank Examiner.

This defendant and other defendants made every effort to consummate said plan but were unable to do so, and when it was ascertained that said plan

could not be successfully carried through, it was determined to be necessary to levy a full 100% assessment upon the stockholders of defendant Bank, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7,696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000 and in addition guaranteed the payment of an additional sum of $1,000,000 in order to insure payment to the Bank of the full amount to accrue from said 100% assessment.

This defendant at no time failed or refused to comply with any direction or request of the Comptroller of the Currency. On the contrary, he at all times worked in co-operation with him, in the effort to formulate and carry out a plan for the elimination of all nonproducing or frozen assets.

It is not the fact that during 1926, or 1927, as alleged in Paragraph 16 of the bill of complaint, any further loans were made or credit extended to J. E. Wheeler, either directly or upon his endorsement. On the contrary, these individual defendants, for a long time prior thereto, were endeavoring in every way within their power as directors, to secure the retirement, in part at least, of the indebtedness owing by said J. E. Wheeler and the companies in which he was interested.

No loans in excess of the amounts permitted by law were ever made by these defendants to J. E. Wheeler or to companies in [277] which he was

interested or to any other persons, firms or corporations.

XVII.

The allegations of Paragraph 17 of the bill of complaint are untrue. Defendant Bank was never in a condition such that it was unable to pay its depositors upon demand until on March 28, 1927, a run upon the Bank occurred. Whereupon defendant Bank, in order to insure full and immediate payment to all depositors on demand, entered into a contract with United States National Bank and First National Bank of Portland under the terms of which said two Banks agreed to advance and loan to defendant Bank all moneys necessary to enable defendant Bank to pay its depositors on demand, defendant Bank pledging to said two Banks all of its assets as collateral to said loan and in addition certain of its stockholders, including the Estate of Henry L. Pittock, individually guaranteeing repayment of said loan; and thereupon defendant Bank began liquidation of its assets in order to effect the payment of said loan to said two Banks.

Defendant O. L. Price was elected president of defendant Bank on March 1, 1927, but it is not the fact that thereafter the management of the Bank was left entirely to defendant Price, or that this defendant in any respect, or to any degree, delegated any of his duties as director to the president of the Bank, or to anyone else. And it is not true that in February, 1927, or in March, 1927, or at any other time, the directors, by the adoption of any plans or proposals before them could have avoided

the condition which made necessary in their judgment the agreement with United States National Bank and First National Bank of Portland and the liquidation as hereinabove described. As to the supposed plans or proposals referred to in Paragraph 17 of the bill of complaint, this defendant says: [278]

First. No plan for the reorganization of defendant Bank as a state Bank and trust company was ever developed or perfected so that it was possible of accomplishment. Such a plan was at one time suggested during the conferences with the Chief Bank Examiner hereinabove referred to, but it was rejected by defendant Bank and the Chief Bank Examiner in favor of the plan for transferring the frozen assets to a corporation to be organized with capital furnished by the stockholders of defendant Bank.

Second. So far as this defendant has ever been advised, J. E. Wheeler was never willing to turn over his assets for the protection of defendant Bank, or for the benefit of his creditors, until long after the closing of defendant Bank, although at one time said Wheeler made an indefinite proposal for an assignment provided defendant Bank would advance large additional sums of money. This defendant did not deter or in any way prevent or dissuade said Wheeler from any such transfer of assets, but, on the contrary, was at all times anxious and willing and often demanded that said Wheeler liquidate his property and assets in any way possible so

that his indebtedness to defendant Bank might be paid.

Further answering Paragraph 17 of the bill of complaint this defendant admits that the officers and directors of defendant Bank caused to be published, on March 2, 1927, the announcement quoted on page 22 of the bill, but it is not true that the directors of the Bank left the sole management and control to defendant Price or in any manner abdicated their responsibilities as directors. Nor is it true that the run on the Bank, which occurred almost four weeks later, was permitted by defendant Price or any of the then directors of the Bank, or that they refrained from doing everything in their power to prevent it.

The announcement so published on March 2, 1927, resulted from the fact that at that time the directors of defendant [279] Bank having been unable to carry through the plan for the organization of a corporation to take over nonproducing or frozen assets, decided that with the consent and approval of the Chief Bank Examiner, an assessment of 100% upon the capital stock of the Bank should be made, whereupon certain stockholders, including the Estate of Henry L. Pittock, holding 7,696 shares, undertook and agreed to purchase and pay the assessment upon any and all stock sold for failure to pay the assessment, and in furtherance of said agreement said stockholders advanced the sum of $1,000,000, and in addition guaranteed the payment of an additional sum of $1,000,000, in order to

insure payment to defendant Bank of the full amount to accrue from said 100% assessment.

XVIII.

It is not the fact that any secret or undisclosed agreements have been made as alleged in Paragraph 18 of the bill of complaint. The agreements said to have been placed in the custody of James B. Kerr are the agreements already referred to in this answer between defendant Bank and its guaranteeing stockholders on the one hand and the United States National Bank and the First National Bank of Portland on the other. Said agreements were not kept secret, but, on the contrary, were presented to and duly ratified at a meeting of the stockholders of defendant Bank held May 3, 1927, and said agreements were thereupon spread upon the minutes of the stockholders' meeting of May 3, 1927. At said meeting the shares of stock alleged in the bill to belong to complainant were represented by the proxy of the record owner, Francis P. Graves & Company, and said stock was duly voted at said meeting in favor of the ratification of said agreements, and the owner of said stock should be and is estopped from objecting to the making of said agreements.

XIX.

It is not the fact that the directors of defendant Bank made or caused losses to said Bank in two million dollars, or in [280] any sum, nor is it the fact that the directors impaired the capital stock of the Bank or wilfully or intentionally depreciated

or destroyed any investment in the stock of the Bank.

XX.

It is not the fact that this defendant gave out or published improperly or carelessly or negligently or unlawfully or at all any information about the internal affairs of the Bank. It is true that negotiations were had on one or more occasions for the sale and transfer to another Bank of the assets, business, and goodwill of defendant Bank, and that the prospective purchaser was given such information about the properties offered for sale as was necessary to the negotiations. But the directors conducting such negotiations acted honestly and faithfully in the interest of defendant Bank and its stockholders, and at no time did they improperly disclose or make public the private affairs of the Bank or give out any information which in any way worked to the disadvantage of the Bank.

XXI.

This defendant is ready and willing to disclose any and all facts in his possession which may be relevant or pertinent to any issue herein. But all books and records of defendant Bank are, and at all times have been, open to and available for inspection by the stockholders of defendant Bank, but none of said books or records is in the possession of this answering defendant.

XXII.

This defendant admits that defendant Bank is now claiming that complainant is indebted to de-

fendant Bank. Except as thus admitted this defendant specifically denies each and every allegation of Paragraph 22 of the bill of complaint.

Complainant is indebted to defendant Bank in the sum of $10,000, with accrued and accruing interest. This indebtedness [281] complainant has for a number of years failed to pay, but has insisted upon renewals of his notes as they respectively matured. This defendant says that nothing in any of the matters attempted to be set out in complainant's bill justifies complainant's failure to pay his indebtedness to defendant Bank, but that defendant Bank should be permitted, notwithstanding complainant's demands herein, to enforce immediate payment by complainant of the principal and interest of his debt.

XXIII.

The answer made by this defendant to Paragraph 22 of the bill of complaint sufficiently answers Paragraph 23 of the bill. No accounting of any kind is due complainant from defendant Bank or from this defendant, and complainant should not be permitted to use the demands or claims asserted in his bill as an excuse for withholding payment of his overdue obligation to defendant Bank.

XXIV.

For answer to Paragraph 24 of the bill of complaint this defendant says that the bill is without equity. This defendant and defendant Bank have not at any time refrained, and are not now refraining, from any necessary or proper step for the re-

dress of any wrong done to defendant Bank, but nothing in any of the matters attempted to be stated in the bill justifies the charge that this defendant has committed any wrong upon defendant Bank, and no stockholder, prior to the institution of a suit brought by a stockholder, one Charles A. Burckhardt, simultaneously with the filing of this bill, has ever made any complaint to defendant Bank, or its directors, of any such wrong, nor has any demand ever been made for the redress of any such supposed wrong. [282]

This defendant denies that he now controls or ever has controlled the affairs of defendant Bank and avers that at all times in his actions as a director and as a stockholder he has been faithful in the performance of his duties as a director and faithful to the rights of the Bank and of its stockholders.

For a further and separate answer and by way of abatement of this suit, this defendant says that complainant is without right, authority, or qualification to bring this proceeding, and the proceeding should be abated and dismissed.

Complainant is not, and at the time of commencing this suit was not, a stockholder of defendant Bank. On October 18, 1926, complainant endorsed and transferred to Francis P. Graves & Company the stock in defendant Bank theretofore owned by him, and at his direction said stock was thereupon transferred upon the books of defendant Bank and new certificates therefor issued to the transferee.

Since October 18, 1926, complainant has not been a stockholder in defendant Bank.

WHEREFORE, this defendant, having fully answered the bill of complaint herein, prays that he be hence dismissed with costs and his disbursements herein taxed against complainant.

D. P. PRICE and
JOHN F. LOGAN,
Attorneys for the Defendant.

JOHN F. LOGAN,
Of Counsel. [283]

State of Oregon,
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 19th day of December, 1927, by receiving a copy thereof, duly certified to as such by John F. Logan, of attorneys for defendant Charles A. Morden.

W. C. BRISTOL,
Attorney for Complainant.

Filed December 19, 1927. [284]

AND AFTERWARDS, to wit, on Tuesday, the 27th day of December, 1927, the same being the 37th judicial day of the regular November term of said court,—Present the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [285]

[Title of Court and Cause.]

MINUTES OF COURT—DECEMBER 27, 1927—ORDER GRANTING MOTION OF DEFENDANT CHAUNCEY McCORMICK TO QUASH SERVICE OF SUBPOENA AND DISMISS THE SUIT AS TO HIM.

This proceeding came before the Court on December 19, 1927, upon motion of defendant Chauncey McCormick, appearing specially for the purpose of the motion only, to quash service of subpoena and to dismiss the suit as to him, said defendant appearing by Messrs. James B. Kerr and Charles A. Hart, his attorneys, and complainant appearing by William C. Bristol, Esq., his attorney; and it appearing from the record herein that said defendant Chauncey McCormick is a resident and inhabitant of the Northern District of Illinois, Eastern Division at Chicago, Illinois, and that complainant is a resident and [286] inhabitant of the Southern District of California, and that the said defendant Chauncey McCormick is not suable in the District of Oregon wherein this suit is brought;

Therefore it is

ORDERED that the motion of defendant Chauncey McCormick be and the same is hereby allowed and that this suit be and the same is hereby dismissed as to defendant Chauncey McCormick.

Dated this 27th day of December, 1927.

R. S. BEAN,
District Judge.

Filed December 27, 1927. [287]

AND AFTERWARDS, to wit, on the 9th day of January, 1928, there was duly filed in said court, an answer of defendant Emery Olmstead, in words and figures as follows, to wit: [288]

[Title of Court and Cause.]

ANSWER OF RESPONDENT EMERY OLMSTEAD.

Now comes the respondent Emery Olmstead, and for answer to complainant's complaint admits, denies and alleges, as follows:

I.

Respondent says that it is true that Fred A. Ballin, complainant, is a resident and citizen of the State of California, and that Chauncey McCormick is a resident and citizen of the State of Illinois, and that The Northwestern National Bank is an association organized under the laws of the United States for carrying on the business of banking under and pursuant to the statutes, to wit, Section 5133, and other statutes of the kind and character mentioned in complainant's bill.

It is also true that O. L. Price, A. D. Charlton, E. S. Collins, Natt McDougall, Phil Metschan,

Frederick F. Pittock, Mark Skinner, Charles K. Spaulding, Charles H. Stewart and James F. Twohy were and are the directors of The Northwestern National Bank, and that each of them is a citizen and resident of the State of [289] Oregon.

It is also true that Charles A. Morden, together with O. L. Price are trustees of the H. L. Pittock estate, and that for part of the time mentioned in complainant's bill Charles A. Morden was a director of said Bank and was one of the members of the Examining Committee of said Bank.

It is also true that Emery Olmstead was president of the Northwestern National Bank from some time in 1919 until the last of February, 1927, and in this connection respondent says that on the 28th day of February, 1927, respondent resigned as president and director, and the said O. L. Price succeeded him as president of said Bank; that since said time the respondent Emery Olmstead has had nothing whatever to do with The Northwestern National Bank, either as an official of said Bank, or otherwise.

II

Respondent admits the allegations contained in Paragraphs 2 and 3 of complainant's complaint.

III.

Answering the allegations contained in Paragraph 4, this respondent says that it is not true that he at any time committed any act and/or acts for the purpose of injuring the stockholders, and in this connection respondent says that every act

done or performed by him while he was a member of the board of directors, or while he was acting as president, was done for the purpose of benefiting the Bank and enabling it to pay dividends to the stockholders.

In connection with the allegation in complainant's bill that demand was made upon the directors prior to the institution of this suit, this respondent says that he was not on the board [290] of directors at said time, and was not engaged in directing the affairs of the said Bank.

It is true that complainant is a holder of capital stock of The Northwestern National Bank, and it is true that the said Charles A. Burckhardt, complainant, was not a member of the board of directors at the time of the happening of the affairs delineated in said bill of complaint.

It is not true that this respondent ever at any time dominated or controlled the said Bank, nor is it true that this respondent at any time did anything to injure or destroy the value of the minority stockholders' stock.

Each and every other allegation contained in said paragraph, this respondent specifically denies.

IV.

Answering the allegations contained in Paragraph 5, your respondent says that Charles A. Morden, at one time director and member of the board of said Bank, and O. L. Price, as trustees of the H. L. Pittock estate, controlled seventy-six hundred and ninety-six (7696) shares of the capital

stock of said Bank, and that, in addition thereto, O. L. Price personally holds and has under his control two hundred and ninety (290) shares, and that Frederick F. Pittock holds one hundred (100) shares, and it is also true that Charles A. Morden individually held at one time fifty (50) shares, and that by reason of said holdings Price and Morden control or are in a position to control the said Bank;

And in this connection your respondent alleges that in the year 1922, and while Charles A. Morden was one of the trustees of the H. L. Pittock estate and possessed of certain duties in relation to said trusteeship, the said Charles A. Morden sold his fifty (50) shares of stock and resigned as a director and as a [291] member of the Examining Committee; that in connection with his duties while acting on the Examining Committee, the said Charles A. Morden, prior to said time, had occasion to and did pass upon practically all of the loans mentioned in Paragraph 10 of complainant's bill; that by resigning from the Examining Committee and board of directors of The Northwestern National Bank, the said Charles A. Morden refused to perform his duties as required of him by law and under his trusteeship of the H. L. Pittock estate.

V.

Answering the allegations contained in Paragraph 6, your respondent says that it is true that complainant was solicited to be and become a stockholder, and was persuaded to purchase two hun-

dred (200) shares of the capital stock of The Northwestern National Bank at the market value of twenty-seven thousand five hundred dollars ($27,500.00), and received certificates numbered 101 and 153 for two hundred (200) shares, and ever since has been the owner of said stock; and it is true also that complainant was informed that the condition of said Bank with H. L. Pittock, then living, as president, and with the Pittock fortune and influence, was good and prosperous, and the directors, or some of them, stated that the Bank had made unusual progress and had an unequalled foundation and support in the Oregonian Publishing Company.

VI.

Answering the allegations contained in Paragraph 7, this respondent says that it is true that the directors took the oath of office and agreed to conduct the affairs of said Bank in conformity with the law; and in this respect your respondent [292] says that, so far as he was able, he did conduct the said Bank in conformity with the rules and regulations and the law appertaining to National Banks, and that between the years of 1920 and 1926, inclusive, under the management of your respondent, The Northwestern National Bank made in profits a sum in excess of one million four hundred thousand dollars ($1,400,000.00); that because of the matters and things hereinafter set forth, to which reference is hereby made, the earnings were not used for the payment of dividends, but were used, because of the peculiar situation existing at said

time, to take care of losses on what is commonly called "bad loans."

VII.

Answering the allegations contained in Paragraph 8, your respondent says that the H. L. Pittock estate trustees, and those associated with them and identified with them, controlled and directed the affairs of The Northwestern National Bank in the selection and maintenance of the directors and officers of the said Bank.

VIII.

Answering the allegations contained in Paragraph 9, your respondent denies that the capital of said Bank was apparent, and states in this connection that the capital was real, and approximately as alleged in Paragraph 9 of complainant's bill.

IX.

Answering the allegations contained in Paragraph 10, your respondent says that at the time of the happening of the events and transactions narrated in Paragraph 10, or most of them, and particularly in 1918 and 1919 during the World War, your respondent [293] was actively engaged, by and with the knowledge, consent and appointment of the board of directors, in securing business for said Bank, making eastern connections, and, during the World War, in raising money for the United States Government in that he had charge of all of the Liberty Loan drives, including the Victory Loan, five in number, in the city of Portland, Oregon; that your respondent was also

Chairman of the War Camp Community Service of the State of Oregon, and also chairman of the committee of fifteen for the development of the west channel of the river and Swan Island and Guild's Lake, a project involving a ten million dollar expenditure; that your respondent during said times also caused to be organized the Columbia-Pacific Steamship Company, which was organized after the war, and which company was developed up to the point where it operated eleven boats running to the Orient out of the city of Portland; that these duties, together with numerous other duties, necessarily demanded of your respondent a great deal of time, and that, by reason of the numerous duties devolving upon your respondent, he was not able to give personal attention to all of the loans made by the said Bank, and in order that your respondent might make the necessary connections in a financial way, secure new accounts, and build up the said Bank, there was appointed a number of vice-presidents of said Bank, which appointments were made by the board of directors of the said Bank, and at the same time the said board of directors placed the said vice-presidents in charge of certain loans, giving them full power to investigate the persons or bodies corporate applying for a loan prior to the making of the same; that said vice-presidents were required to report to the board of directors upon the safety of the said loans, and your respondent of necessity had to rely upon such investigations and sworn statements of the applicant for loans; that this method employed

by your respondent, and directed by the [294] board of directors, was the usual, ordinary and customary method of handling loans made by banks of the kind and character of the Northwestern National Bank.

That in regard to Item 1, in Paragraph 10, your respondent says that the loan made to the Dufur Orchards Company was originally seventy thousand dollars ($70,000.00), and that said company owned large orchard tracts near Dufur, Oregon, and that your respondent opposed any further loans to the said Orchards Company; that thereupon a committee was appointed to examine into the affairs of said Orchards Company; that this committee visited the said tract and approved of a loan and/or loans in excess of six hundred thousand dollars ($600,000.00), in that they recommended that the Bank purchase three hundred thousand dollars ($300,000.00) of bonds that were in default upon the said property, and thereafter a majority of the board caused to be advanced to the said Orchards Company a total sum of six hundred thousand dollars ($600,000.00); that your respondent objected to this loan, but was overruled by a majority of the board, and your respondent was compelled to take more than three hundred thousand dollars ($300,000.00) out of the earnings of said Bank to charge the asset down to where he felt it was safe.

In regard to Item 2 of said Paragraph 10, your respondent says that this was a war loan approved by the board of directors; that it proved not to be

good, but in this connection your respondent says that careful investigation was made of the financial standing and plans of the said A. O. Anderson, and that the said loan was made in good faith so far as your respondent is concerned, believing at the time that the Bank was safe in making said loan; and in this connection your respondent says that he, while acting as president of said Bank, was successful in apprehending A. O. Anderson in the city of New York, and after suit brought in said courts collected [295] a sum in excess of sixty thousand dollars ($60,000.00), and that said sum mentioned in said complaint should be reduced by said amount.

In regard to Item 3, your respondent says that he did not have charge of said loan to A. Rupert & Co.; that the same was handled by other officials of the Bank and after due investigation by them, and that he relied upon the investigation made by the other bank officials. Your respondent admits that said loan was a loss to said Bank.

In regard to Item 4, your respondent says that it is not true that he made this loan, but on the contrary avers that said loan was handled by a vice-president and said business was obtained by said vice-president, and said loan was based upon the statements made by said Bankers Discount Corporation and the investigation of said vice-president, and the same was made in the ordinary course of business so far as your respondent is concerned.

Your respondent says that all of the other items mentioned in said specifications, numbered from 6 to 16, inclusive, were made in approximately the same manner and after due investigation, and in

this connection your respondent desires to state that the loan made to J. E. Wheeler was one made after due investigation; that at the time said loan was made, or shortly thereafter, the said loan was amply secured; that there is now in the possession of said Bank security protecting said loan of the reasonable value of a sum of money in excess of six hundred thousand dollars ($600,000.00); that The Northwestern National Bank had various and sundry guaranties of the said J. E. Wheeler, which guaranties in effect provided that J. E. Wheeler would pay not only his own direct obligations, but all of the obligations of any and all of his companies, including the McCormick Lumber Company, the Wheeler Timber Company, the W. E. Wheeler Estate, and the Telegram Publishing [296] Company, and in this connection your respondent alleges that the statement of J. E. Wheeler in February of 1925, showed assets as follows:

Accounts Receivable	315,000.00
Notes Receivable	456,330.00
Timber stocks, bank stocks, etc.	4,400,000.00
50% The Portland Telegram	400,000.00
60% McCormick Lumber Company	600,000.00
¼ interest W. E. Wheeler estate	1,000,000.00
Real Estate	102,000.00
	$7,273,330.00

and that said statement showed a net worth of more than six million dollars ($6,000,000.00); that in addition to the statement above delineated, The Northwestern National Bank had statements from

the different companies in which J. E. Wheeler was interested showing their net worth, and that the total net worth of all of the companies in which J. E. Wheeler was interested was in excess of eighteen million dollars ($18,000,000.00); that your respondent had made some independent investigation of the financial worth of J. E. Wheeler, particularly with regard to the value of his timber holdings, and your respondent had come to the conclusion that the said J. E. Wheeler under-estimated rather than over-estimated the value of his different holdings; that a recent statement of the holdings and interests of the said J. E. Wheeler shows that the said J. E. Wheeler, after all obligations of every kind and character are paid, has a net worth of four million six hundred ten thousand dollars ($4,610,000.00).

That the loan to the McCormick Lumber Company, mentioned in Item 13, has been paid out of a bond issue placed against the property of the McCormick Lumber Company.

That the loan made to the Wheeler Timber Company and the loan made to the W. E. Wheeler Estate have the endorsements of J. E. Wheeler and W. M. Wheeler; that the same are safe loans, and will be paid in full out of the assets of J. E. Wheeler and/or [297] W. M. Wheeler.

That the loan made to the Telegram Publishing Company is endorsed by J. E. Wheeler and L. R. Wheeler, and that there are ample assets to pay said loan in full.

That the following is a personal statement of the interests, and the value of the same, including the liabilities, of J. E. Wheeler:

ASSETS:		
Timber Holdings		$6,102,000.00
Real Estate		75,000.00
Stock in McCormick Lumber Co.		81,000.00
Stock in Northwestern National Bank		705,000.00
Accounts Receivable due from McCormick Lumber Company		1,572,000.00
Grand Total		$8,535,000.00
LIABILITIES:		
Personal	$1,278,400.00	
Telegram Publishing Co.	549,750.00	

LIABILITIES:		
Bowles judgment	70,000.00	
McCormick Lumber Co.	1,572,000.00	
Ralph Schneeloch Co.	60,500.00	
	3,530,650.00	
Law costs, liquidation and readjustment and unlisted liabilities	194,350.00	
Other liabilities	200,000.00	3,925,000.00
Surplus		$4,610,000.00

That said statement shows that, after all of J. E. Wheeler's obligations have been paid, both contingent and otherwise, he still has for his own estate the sum of four million six hundred ten thousand dollars ($4,610,000.00); and that the District Examiner of Banks stated to your respondent that he was satisfied that J. E. Wheeler was in a stable financial condition during the years of 1926 and 1927.

Your respondent says that it is true that the Examiner of National Banks asked that Wheeler's lines be reduced, upon the [298] ground that there was too much loaned by said Bank to one person, and to this end your respondent consulted with J. E. Wheeler and L. R. Wheeler, the owners of the Telegram Publishing Company, and at said time, or thereabouts, your respondent succeeded in finding a purchaser, ready, willing and able to purchase the "Telegram" and its plant for the sum of nine hundred thousand dollars ($900,000.00) cash; that L. R. Wheeler signed a written option to sell the same; that J. E. Wheeler refused to sell the plant for such a price, and thereupon the said J. E. Wheeler consulted with the other members of the board of directors of The Northwestern National Bank, to wit, O. L. Price, Phil Metschan, E. S. Collins, A. D. Charlton and Charles K. Spaulding, who were members of the executive committee, and notwithstanding the demands of the National Bank Examiner, and notwithstanding the request of your respondent that said "Telegram" be sold and said lines of credit be reduced, each and every member

of said committee refused to allow or permit a sale of the said paper; that had said sale been made, the entire indebtedness of the Telegram Publishing Company would have been paid to said Bank, and some four hundred thousand dollars ($400,000.00) would have been available for the said J. E. Wheeler to pay other obligations of his said companies to the Bank at said time; that it was because of the failure of the directors above named to back up the request of your respondent that your respondent was unable to reduce the lines of credit enjoyed by J. E. Wheeler and/or his companies.

That in order to comply with the said National Bank Examiner's request, your respondent also tried to negotiate the sale of various timber tracts owned by the said J. E. Wheeler, or in which he had an interest; that because of the lumber conditions then existing, it was difficult and almost impossible to make a sale of the said timber holdings in a short period of time; that [299] had the other members of the board of directors worked with your respondent, a sale of the "Telegram" would have been consummated, and the indebtedness of the said J. E. Wheeler and/or his companies would have been largely paid.

Your respondent further says that it is not true that the Bank was forced into liquidation by reason of said loans, and in this connection your respondent says that said loans were not public property and were not known generally to the public. Your respondent avers that the said Bank was forced into liquidation because of false and malicious

rumors about its solvency; that in this connection your respondent says that false and malicious rumors were circulated in and about the city of Portland, causing an unprecedented run upon the said Bank; that during the first day alone of said run the said Bank paid out a sum of money in the approximate amount of three million dollars ($3,000,000.00) to depositors; that in nine months' time the said Northwestern National Bank has paid out to depositors eighteen million three hundred thousand dollars ($18,300,000.00), and that all of said moneys came from assets of the Bank, and not from any guaranties of any kind or character, and in this connection your respondent is informed and believes, and therefore alleges, that the depositors have been paid in full and that there will be available for the stockholders some two million five hundred thousand dollars ($2,500,000.00).

X.

Answering the allegations contained in Paragraph 11, your respondent says that so long as he was president of the said Bank he kept the stockholders informed of the affairs of the said Bank, and did not suppress any information to which the said stockholders were entitled, nor did he suppress any information to which the directors were entitled. [300]

Your respondent says that it is true that Charles A. Morden resigned as director, and admits that Charles K. Spaulding succeeded him, and that thereafter Phil Metschan, Charles K. Spaulding and

A. D. Charlton constituted the Examining Committee.

Your respondent says that it is true that the said Examining Committee made one report to the Comptroller of the Currency of the United States and a different report to Mark Skinner, vice-president, and that said report was different in that, among other things, it criticized certain loans or lines of credit, and did not reveal said criticisms to the Comptroller.

Your respondent denies each and every other allegation, specifically and generally, contained in said paragraph.

XI.

In regard to the allegations contained in Paragraph 12, your respondent denies all that portion of the same which has not been alleged or admitted heretofore, and states that he recommended that a new bank be organized, and that to this arrangement the said Bank Examiner agreed and all arrangements had been made to take out of said Bank the slow paper and frozen assets; that all of the stock in the new bank had been subscribed for, and all preliminary action had been taken by the board of directors, with the exception of securing a charter for the said new bank; that all of said organization and preliminary matters had been agreed to by all of the members of the board of directors when, without notice or reason of any kind or character, O. L. Price, then controlling the said Northwestern National Bank by reason of his stock, announced that he would not go ahead with the deal; that had

said organization of said new bank been made, and the proceedings had as agreed to by the board of directors and as approved by the National Bank Examiner, all of the slow paper and frozen assets [301] would have been placed in a separate corporation, and the new bank would have been able to pay dividends and carry on as a successful banking institution, and neither the depositors' nor any of the stockholders' interests would have been jeopardized, and no one would have sustained a loss.

That there was subscribed for said new bank the sum of two million dollars ($2,000,000.00) in capital, and two hundred thousand dollars ($200,000.00) in surplus.

That your respondent at all the times while he was either president, vice-president or director of said Bank, used all of his knowledge, skill and experience gained over a period of thirty-odd years of banking to carry said institution along in the manner provided by law, and in accordance with good banking system; that for more than ten years your respondent, through acquiring new connections and new business, was able to earn enough to pay dividends every year had not conditions arisen over which your respondent had no control.

XII.

In answering Paragraph 13 your respondent says that he at no time suppressed or concealed from this complainant, or any other shareholder, any of the facts to which they were entitled, and admits that the trustees for the H. L. Pittock estate, and

their associates, controlled and managed the said Bank and had the power so to do.

XIII.

Answering Paragraph 14 your respondent says that O. L. Price, L. B. Menefee, R. V. Jones and Guy M. Standifer, through their stock control, did attempt to sell The Northwestern National Bank in 1923 to the United States National Bank, and in this [302] connection your respondent says that an officer of The Northwestern National Bank, to wit, O. L. Price, prior to the liquidation of the Bank, offered to sell the said Bank to the First National Bank; that all of these matters and things caused rumors and reports to be circulated, or had a tendency to, and hampered and harassed your respondent in building up the said Bank.

That your respondent did not have anything to do with the offer of sale of said Bank at said time, and in this regard your respondent asks that the complainant be required to make proof of the remaining allegations in said paragraph.

XIV.

Answering the allegations contained in Paragraph 15, your respondent says that it is true that during the latter part of 1925 and the fore part of 1926, the directors of said Bank were informed that the Telegram Publishing Company might be sold for the price of nine hundred thousand dollars ($900,000.00), and that if the said Telegram had been sold for said price it would have liquidated all

of the Telegram's indebtedness and the greater portion of the indebtedness of J. E. Wheeler and/or his companies at the said Bank; and it is also true that had the Telegram been sold, and had the Bank used the security it then held of J. E. Wheeler's, it could have collected all the money owed by J. E. Wheeler and/or his companies in February of 1927; that the value of said securities and the offer for the Telegram was sufficient in amount to have liquidated all of the indebtedness of J. E. Wheeler and/or his companies; and it is also true that directors Metschan, Spaulding, Charlton, Morden, Collins and Price refused to allow or permit the said Telegram to be sold, and by this action of the members of the board your respondent was prevented from liquidating all of Wheeler's indebtedness; that said action on the part of [303] said directors was arbitrary, and without any just cause or reason.

XV.

In answer to Paragraph 16, your respondent says that it is not true that the statement book under "Items in Transit" would show the slow loans; that, on the contrary, said statement book would show every day all out-of-town checks either accepted as cash or sent for collection, so that all checks that went through the Bank, of whatever kind or character, if they were checks on other banks, would be shown on the statement book under "Items in Transit," and that this record at all times was available of and concerning any check of any depositor's account, and that if the other di-

rectors of the Bank did not know what checks were in transit, or what checks were accepted for deposit, it was because they did not care to know and refused to be informed.

In other respects, your respondent admits the allegations contained in Paragraph 16, except as the same is in this answer varied or qualified, and except that your respondent denies that he at any time had any intent, or knowledge of any action by the board, to impair the assets of said Bank, and in this connection, and by way of explanation of the action of your respondent of and concerning the matters alleged in said paragraph, your respondent alleges that J. E. Wheeler held approximately twenty-three and one-half per cent (23½%) of the stock in The Northwestern National Bank, and that he, the said Wheeler, did not have sufficient money, in case said organization described in Paragraph 16 of complainant's complaint was made, to take his portion of the stock to be subscribed for and paid for in the new liquidating company, and in order that this deal might be carried through this respondent secured a purchaser, ready, able and willing to buy the "Portland Telegram" at the price of nine hundred thousand dollars ($900,000.00), [304] as hereinbefore delineated, and your respondent prays that the explanation of said sale heretofore delineated be read in connection with this paragraph.

XVI.

In answer to Paragraph 17, and subheadings

"First" and "Second," and the allegations contained in Paragraphs 18, 19, 20, 21, 22, 23 and 24 of said bill of complaint, your respondent says that the matters therein delineated and alleged were matters which happened after he resigned from the board of directors, and after he had resigned as president, and he has no knowledge of the same, and therefore denies the same, and asks that proof be made of said allegations, and in this connection, in regard to the requests of the National Bank Examiner as alleged in said paragraphs, your respondent says that it is not true that he refused to carry out said deal, but, on the contrary, your respondent urged the board of directors to carry out said deal and stated at said time that it was the only alternative of said Bank and that if said plan was carried out it would meet the approval of the Comptroller and the National Bank Examiner; that notwithstanding the recommendations of your respondent, O. L. Price, afterwards president of said Bank, stated that he had decided not to carry it through; and that it was due to such transactions as this, and the false rumors circulated about said Bank, that the same was forced into liquidation, and not otherwise, and that said Bank was not forced into liquidation because of any precarious condition, as is shown by the matters and things hereinbefore set forth. [305]

WHEREFORE, This respondent prays that com-

plainant's bill may be dismissed, and that he recover his costs and disbursements herein.

SHEPPARD, PHILLIPS & RALSTON,
Attorneys for Respondent, Emery Olmstead.
CHESTER A. SHEPPARD,
Of Counsel.

United States of America,
State and District of Oregon,
County of Multnomah,—ss

I, Emery Olmstead, being first duly sworn, depose and say that I am one of the respondents in the above-entitled suit; and that the foregoing answer is true, as I verily believe.

(Sgd.) EMERY OLMSTEAD.

Subscribed and sworn to before me this 6th day of January, 1928.

[Notarial Seal]

(Sgd.) WM. C. RALSTON,
Notary Public for Oregon.

My commission expires January 11, 1929.

State of Oregon,
County of Multnomah,—ss.

Due service of the foregoing answer of respondent Emery Olmstead by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 9th day of January, 1928.

W. C. BRISTOL,
Attorney for Complainant.

Filed January 9, 1928 [305A]

AND AFTERWARDS, to wit, on Wednesday, the 11th day of July, 1928, the same being the 8th judicial day of the regular July Term of said court,—Present the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [306]

In the District Court of the United States for the District of Oregon.

IN EQUITY—E.-8939.

FRED A. BALLIN,

Complainant,

vs.

THE NORTHWESTERN NATIONAL BANK, CHARLES K. SPAULDING, PHIL METSCHAN, A. D. CHARLTON, E. S. COLLINS, CHAUNCY McCORMICK, NATT McDOUGALL, FREDERICK F. PITTOCK, MARK SKINNER, CHARLES H. STEWART, O. L. PRICE, EMERY OLMSTEAD, JAMES F. TWOHY and CHARLES A. MORDEN,

Respondents.

MINUTES OF COURT—JULY 11, 1928—DECREE.

This cause came on to be heard on June 18, 1928, at this term, and the Court heard evidence offered on behalf of the respective parties hereto and argu-

ments of counsel; thereupon, upon consideration thereof, it was ORDERED, ADJUDGED, AND DECREED as follows, viz:

That the complainant failed to establish the allegations of his bill of complaint; that said bill is without equity and complainant is entitled to no relief as to the defendants, and said bill of complaint and cause of suit as to to said defendants is hereby dismissed, and it is

FURTHER ORERED, ADJUDGED AND DECREED that the said defendants have and recover of the complainant their respective costs and disbursements herein to be taxed.

Done this 11th day of July, 1928.

R. S. BEAN,
Judge.

Filed July 11, 1928. [307]

And to wit, on the 13th day of May, 1929, there was duly filed in said court a statement of the evidence, in words and figures as follows, to wit: [329]

In the District Court of the United States in and for the District of Oregon.

IN EQUITY—No. E.–8936.

CHARLES A. BURCKHARDT,

Complainant,

vs.

THE NORTHWESTERN NATIONAL BANK, CHARLES K. SPAULDING, PHIL METSCHAN, A. D. CHARLTON, E. S. COLLINS, CHAUNCEY McCORMICK, NATT McDOUGALL, FREDERICK F. POTTOCK, MARK SKINNER, CHARLES H. STEWART, O. L. PRICE, EMERY OLMSTEAD, JAMES F. TWOHY and CHARLES A. MORDEN,

Respondents.

No. E.–8939.

FRED A. BALLIN,

Complainant,

vs.

THE NORTHWESTERN NATIONAL BANK, CHARLES K. SPAULDING, PHIL METSCHAN, A. D. CHARLTON, E. S. COLLINS, CHAUNCEY McCORMICK, NATT McDOUGALL, FREDERICK F. PITTOCK, MARK SKINNER, CHARLES H. STEWART, O. L. PRICE, EMERY OLMSTEAD, JAMES F. TWOHY and CHARLES A. MORDEN,

Respondents.

STATEMENT OF THE EVIDENCE.

The evidence shows that the defendant, The Northwestern National Bank was organized in the year 1912, and that the defendants Olmstead and Charlton then became and continued to be stockholders and [330—1] directors of said Bank, December 23, 1912.

All of the other directors, defendants named, acquired their stock and became directors on and prior to the 9th day of January, 1922. E. S. Collins became a director in 1923; O. L. Price and Charles A. Morden as trustees for H. L. Pittock became and were the representatives in his stead June 12, 1922; Emery Olmstead, trustee, became and was the holder of 3821 shares July 1, 1922 (R., pp. 2–15).

The evidence showed the by-laws of this bank were adopted from time to time and that a rewritten series of by-laws culminating with March 31, 1925, was amended and later put in the book.

Up to the time of Pittock's death in 1919 he was president and chairman of the board and some time after his death a separate office of chairman of the board was created which O. L. Price assumed, and the by-laws were changed so as to provide for this separate office and to enlarge the duties and responsibilities. By-law 1 provided,

(7) "Chairman of the Board: The Chairman of the Board shall preside at all meetings of the shareholders, the Board of Directors, and the

Executive Committee. With the Executive Committee and president, and pursuant to and under the control of the Board of Directors he shall direct the general policy of the association. When the Board and/or the Executive Committee be not in session it shall be the duty of the Chairman to confer with the president and other executive officers concerning all banking matters or matters of importance. He shall hold office for the current year for which he is elected, unless he shall resign, become disqualified, or be removed, and any vacancy occurring in the office shall be filled by the remaining members of the board of directors." (R. 23.) [331—2]

(13) "Executive Committee: The Board of Directors shall at the first meeting after the annual election elect an executive committee consisting of not less than seven members, to be chosen from the board of directors, and of which the chairman of the board, president, and one of the vice-presidents shall be members. Each member of the committee shall continue to be a member thereof until the expiration of his term of office as director, but shall be subject to removal at any time by an affirmative vote of a majority of the whole board.

The executive committee, when the board of directors is not in session, unless otherwise ordered by and subject to the board, shall possess and may exercise all the powers of the board of directors in the management of the affairs of the association. From time to time it may appoint, empower, direct, receive reports from, and discharge such commit-

tee as, in its discretion, it may consider useful in the proper conduct of the affairs of the association.

It shall be the duty of the executive committee to keep fully informed in regard to current business of the association and, when the board is not in session, to superintend the transaction thereof; to pass upon, supervise, regulate and control lines of credit, investments of funds of the bank, purchases and sales of securities, loans or collateral, discounts, and purchases of bills, notes or other evidences of debt, and purchases and sales of bills of exchange; to fix all salaries and compensations paid or payable by the association, except as otherwise declared in the by-laws or by resolution of the board of directors; to fill any vacancy in the committee by election of a member of the board of directors, to be confirmed by the board at its next meeting, and, in the event of the absence of any member of the executive committee, in its discretion to appoint a member of the board of directors to fill the place of such absent member, to serve during such absence.

The committee shall meet at least once each week and a majority of the members of the committee shall constitute a quorum thereof necessary for the transaction of business.

The committee shall appoint a secretary, whose duty it shall be to record the proceedings of the committee in full in a minute book of the bank, to be kept and provided for such purpose, and the record of such proceedings shall be signed by all members of the committee participating therein.

Such record shall be open at all times to the inspection of any member of the board of directors, and all action by the executive committee shall be reported to the board of directors at its meeting next succeeding such action." (R., pp. 24, 25.)

Pursuant to that by-law, Price was secretary [332—3] of the executive committee for a while and was succeeded by Mark Skinner but the Bank had an executive committee from the outset.

On January 9, 1923, Sec. 6 of the by-laws of the Bank was amended to read as follows:

"Sec. 6. President. The president shall be the chief executive officer of the bank, reporting to the Executive Committee and the Board of Directors when the Board of Directors and/or Executive Committee shall be in session. It shall be the duty of the president to confer with the Chairman of the Board and other executive officers concerning all matters of importance or policy. He shall fix the salaries and compensation of all employees of the bank not elected or appointed by the Board of Directors or the Executive Committee. He shall hold office for the current year for which the Board of which he is a member was elected, unless he shall resign or become disqualified, or be removed. And any vacancy occurring in the office of president shall be filled by the remaining members of the Board of directors." (R., p. 27.)

(17) "Directors' Meetings. The board of directors shall hold regular meetings on the third Wednesday of each month, and should that day at any time fall upon a holiday, the regular meeting

for that day shall be held on the following day. The board may also hold special meetings upon the call of the chairman, the president, either vice-president, cashier, or any three or more members, and whenever there shall not be a quorum at a regular or special meeting, the members present may adjourn the meeting from day to day until a quorum shall be obtained; and any meeting may be adjourned from time to time by vote of a majority of a quorum present, but no business except adjournment shall be transacted in the absence of a quorum. The board shall at its monthly meetings, or oftener, examine and approve or disapprove the report of the executive committee, such action to be recorded in the minutes of the meeting." (R., p. 30.)

(19) "Compensation of Directors. Each director, unless he shall be paid a regular salary by the bank, shall receive the sum of ten ($10.00) dollars for attendance at any regular or special meeting of the board of directors; and each director, unless he shall be paid a regular salary by the bank, shall receive the sum of twenty ($20.00) dollars for [333—4] attendance at any regular or special meeting of the executive committee, whether a quorum be present or not." (R., p. 31.)

(25) "Forms of books and account. The Board of Directors shall have power to prescribe, and when expedient to change, the form of books and accounts to be used in the transaction of business of this bank, and to prescribe the general or particu-

lar manner in which its affairs shall be conducted." (R., p. 31.)

(30) "Examination. The Board shall at least once in each year and as much oftener as in its discretion shall be deemed advisable, cause a thorough examination of the bank to be made for the purpose of ascertaining if its affairs are in sound and solvent condition and recommending to the officers such changes in manner of doing business as shall seem advisable. The result of each examination shall be reported to the Board at the next regular meeting thereafter. For the purpose of making such examinations the Board of Directors may employ such expert assistance as in its judgment is deemed advisable. Each member of the Examining Committee who shall engage in conducting such examination, shall be paid at the rate of $10.00 per day for time actually expended in making such examination." (R., p. 32.)

(19) "Compensation of directors: Each director *otherwise* he shall be paid a regular salary by the bank, shall receive the sum of $10.00 for attendance at any regular or special meeting of the board of directors, or the Executive Committee, whether a quorum be present or not." (R., p. 33.)

On January 8, 1924, the directors met, including Price, Olmstead, Metschan, Spaulding, Pittock, Collins, Natt McDougall and Skinner, and at that time Sec. 13 of the by-laws of the Bank hereinbefore set forth was amended to read as follows:

(13) "Executive Committee. The Board of Directors shall at the first meeting after the annual

election elect an Executive Committee consisting of not less than seven members, to be chosen from the Board of Directors and of which the Chairman of the Board, President, and one of the vice-presidents shall be members. Each member of the Committee shall continue to be a member thereof until the expiration of his term of office as director, but shall be subject [334—5] to removal at any time by an affirmative vote of a majority of the whole Board. The Executive Committee, when the Board of Directors is not in session, unless otherwise ordered by and subject to the Board, shall possess and may exercise all the powers of the board of directors in the management of the affairs of the association. From time to time it may appoint, empower, direct, receive reports from, and discharge such committees as, in its discretion, it may consider useful in the proper conduct of the affairs of the association.

It shall be the duty of the Executive Committee to keep fully informed in regard to current business of the association and, when the Board is not in session, to superintend the transactions thereof; to pass upon, supervise, regulate and control lines of credit, investments of funds of the bank, purchases and sales of securities, loans on collateral, discounts, and purchases of bills, notes and other evidences of debt, and purchases and sales of bills of exchange; to fix all salaries and compensations paid or payable by the association, except as otherwise declared in the by-laws or by resolution of the Board of Directors; to fill any vacancy in the Com-

mittee by election of a member of the Board of Directors, to be confirmed by the Board at its next meeting, and, in the event of the absence of any member of the Executive Committee, in its discretion to appoint a member of the Board of Directors to fill the place of such absent member, to serve during such absence. The Committee shall meet at least once each week, and a majority of the members of the Committee shall constitute a quorum thereof necessary for the transaction of business. The Committee shall appoint a secretary whose duty it shall be to record the proceedings of the Committee in full in a minute book of the bank, to be kept and provided for such purpose, and the record of such proceedings shall be signed by all members of the Committee participating therein. Such record shall be open at all times to the inspection of any member of the Board of Directors, and all action by the Executive Committee shall be reported to the Board of Directors at its meeting next succeeding such action." (R., pp. 33, 34.)

Sec. 19 of the by-laws heretofore set forth was amended to read as follows:

(19) "Compensation of Directors. Each director, unless he shall be paid a regular salary by the bank, shall receive the sum of ten ($10.00) dollars for attendance at any regular or special meeting of the board of directors; and each director, unless he shall be paid a regular salary by the bank, shall receive a sum of twenty ($20.00) dollars for attendance at any regular or special meeting of the

[335—6] Executive Committee, whether a quorum be present or not." (R., p. 35.)

The evidence showed that the commencement of the transactions with J. E. and L. R. Wheeler and the "Evening Telegram" (afterwards "The Telegram Publishing Company") commenced the 2d of March, 1915 (R., p. 38) with a loan of $25,000 to the "Evening Telegram," the notes to be endorsed by J. E. and L. R. Wheeler, and on July 13, 1915, this was increased to $50,000 on similar conditions, and on July 17, 1917, this was increased to a line of $60,000, and on August 20, 1918, this was increased again to $70,000; and on September 17, 1918, on condition that "The Telegram Publishing Company" be guaranteed and endorsed by J. R. and L. E. Wheeler, the Bank passed a credit of $100,000. All these transactions were through the executive committee.

On January 11, 1921, Charlton, Kelly, Morden, Metschan, McDougall, Olmstead, Nichols, Price, Pittock, Sensenich and Menafee, then acting as directors, named the executive and Examining Committee of and from their personnel; Charlton, Kelly and Morden becoming members of such committee and the salary of the president, Emery Olmstead was fixed at $25,000 (which thereafter continued down to the close of the Bank at never less than $20,000 a year (R., 88), some reductions having taken place in the meeting of January 10, 1922, as to all the officers) Skinner and Stewart at $15,000 and $12,000 respectively, O. L. Price as vice-

president at $9,000, and subordinate officers at other sums. [336—7]

Subsequently, in July, 1921, the aforesaid executive committee approved advances to the Bankers Discount Corporation and notes and accounts specifically enumerated.

On December 10, 1921, Kelly, Charlton and Morden as the Examining Committee, pursuant to the foregoing resolution appointing them, made a report which for the purposes of this case, except in a few minor particulars, remains substantially the standard form for the Examining Committee except as elsewhere pointed out in the entire course of the transactions involved in these proceedings, and the same is as follows:

"Portland, Oregon, December 10, 1921.

To the Board of Directors of the Northwestern National Bank of Portland, Portland, Oregon.

Gentlemen:

We, the undersigned, your Committee appointed to examine into the affairs of the Northwestern National Bank of Portland, report that on the 1st, 2nd, 3rd, 5th, 6th, 7th, 8th, 9th and 10th days of December, 1921, we made a full and careful examination of the affairs of this bank as of date of December 1, 1921.

We counted the cash; examined bonds and all other securities; we very carefully checked the notes, collateral and real estate. We checked the outstanding and certified checks, cashier's checks, time and demand certificates of deposit and over-

drafts; we verified the outstanding stock certificates; verified the first clearings; examined the expense account and general affairs of the bank, making a full and complete examination of same.

We found the books correct; that the bank is in good condition and that the value at which the assets are carried on the books is fully justified.

Respectfully yours,
(Signed) GEO. H. KELLY
(Signed) A. D. CHARLTON
(Signed) C. A. MORDEN" (R., 87.)

[337—8]

Following this Mr. Morden nominated Mr. Charlton, Mr. Kelly and Mr. Petschan at the annual meeting of 1921 as an Examining Committee, and the directorate continued as before.

On January 10, 1922, the stockholders authorized an increase in the capital stock, and on March 6, 1922, the directors acted with respect to said matter as follows:

"At a special meeting of the Board of Directors of the Northwestern National Bank, of Portland, Oregon, there were present Messrs. Olmstead, Charlton, Metschan, Morden, Menefee, Skinner, Sensenich and Price, Mr. Olmstead presiding.

Upon motion of Mr. Menefee, seconded by Mr. Metschan, the following resolution was unanimously passed.

RESOLVED that, the increased capital stock of this corporation authorized by the stockholders at the annual meeting be offered for sale at $150 per share, and that the present stockholders be given

until April 1, 1922, within which to subscribe to their proportionate share of the increased stock, and that the full amount of the subscription to the increased capital stock shall be paid for in cash on or before June 15, 1922.

There being no further business to come before the meeting, it then adjourned.

(Signed) EMERY OLMSTEAD,
Chairman." (R., 92.)

On the next day, March 7, 1922, an executive committee meeting on the suggestion of Messrs. Metschan and Charlton the committee authorized an advancement on *Receiver'* Certificates to the Dufur Orchards Company, one-half of such amount as might be necessary to care for the orchard up to approximately $17,500, and at that time there was a cancellation of the credit to the Phez Company to the amount of $100,000. [338—9]

"Following a report from President Olmstead that in accordance with the resolution of the Board adopted March 6th, 1922, he had completed the sale of an additional $1,000,000 capital stock of this bank, receiving therefor $1,500,000 in cash, Mr. Kelly offered the following resolution which was seconded by Mr. Metschan and unanimously adopted:

'Upon receipt from the Comptroller of the Currency of his approval of the increase of the capital stock of the bank from $1,000,000 to $2,000,000, with his instructions to change our books accordingly, the officers are directed to credit to the Undivided Profits Account the total amount of premium: viz : $500,000 over and above the par value

received from the sale of the new stock, and following that credit, to transfer from Undivided Profits Account $150,000 to Surplus, and also to transfer from the Undivided Profits Account to Profit and Loss the sum of $388,114.12, which amount is then to be debited to the Profits and Loss Account and credited as follows: $31,953.44 to Stocks and Bonds, $356,160.68 to Loans & Discounts, to cover losses in these two accounts as determined by the Board, including those referred to in the Examiner's Report of the condition of this Bank, issued following his examination which began December 21st, 1921, and ended January 10, 1922.'

"On motion of Mr. Charlton, seconded by Mr. Kelly, the following resolution was then adopted:

'Following the increase of the Capital Stock of this Bank from $1,000,000 to $2,000,000 and the Surplus from $250,000 to $400,000, the officers of this Bank are directed to enter to subscription with the Federal Reserve Bank of San Francisco for 690 additional shares of its Capital Stock at the par value of $100 per share.'

"On motion of Mr. Metschan, duly seconded by Mr. Kelly, Chairman was authorized to appoint a committee of three directors to make a general survey of the affairs of the Bank, including an examination of the income and expenditures, and with a view of making such suggestions and recommendations as it may consider advisable. As such Committee, the Chairman appointed Messrs. Menefee, Kelly and McDougall." (R., 98, 99.)

The evidence establishes that Messrs. Menefee and Kelly made a report as follows, August 16, 1922:

"To the Directors Northwestern National Bank:

Report and Recommendation of Committee Investigating Overhead.

Your Committee has made investigation of [339—10] officers employed and rents paid and submits for your consideration the following.

We find that the general opinion of ourselves and parties familiar with conditions in the Bank is that the list of officers as now constituted is based upon a much larger volume of business than the Bank now enjoys, in fact, ample to handle even more than the war time business of the bank. Also the rents paid for the bank premises are more than could be realized for the space occupied if used for commercial purposes. In view of the above, we hereby recommend:

1st—That the services of Vice-president C. L. Lamping be dispensed with, effective sixty days from date hereof.

2nd.—that the services of Wm. D. Stubbs, Ass't to the president be dispensed with upon thirty days notice from date hereof.

3rd—The monthly rental for bank premises be reduced not less than $500.00 per month, effective Sept. 1st.

4th—The employment of an older and experienced head to the Credit Department.

Respectfully submitted,

(Signed) L. B. MENEFEE.

GEO. H. KELLY." (R., 43.) [340—10–a]

On November 21, 1922, the Examining Committee of the Bank consisting of Charlton, Metschan and Kelly, made the following particular report:

"THE NORTHWESTERN NATIONAL BANK.

Portland, Oregon, November 21, 1922.

To the Board of Directors, The Northwestern National Bank of Portland, Portland, Oregon.

Gentlemen:

We, your Examining Committee, appointed at the annual meeting, beg leave to report that on November 13, 14, 15, 16, 17, 18, 20 and 21, 1922, we made a full and careful examination of the affairs of this bank as of date November 13.

We counted the cash, examined the bonds and all other securities; we checked the notes, collateral and real estate, checked the outstanding and certified checks, cashier's checks, time and demand certificates of deposit and overdrafts; we verified the outstanding stock certificates; verified the first clearings, examined the Expense Account and general affairs of the Bank, making a full and careful examination of same. We found the books correct.

We recommend as follows:

Notes.

States Auto & Truck Co.		Rediscounts not kept up. Recommend that defaulted contracts be taken up by the company.
Miniature Lumber Co.....	$ 2,940	Should be handled in a more satisfactory manner.
Alaska Pacific Navigation Company.	21,641	Should be collected now, or get Mr. Burckhardt's guarantee.
H. R. Albee, Gen Agt.....	15,800	Should be reduced.
J. W. Biggs	3,000	First National Bank, Burns, Ore. When paper is taken not guaranteed look up carefully.
C. E. Bailey	190	Collect.
Bend Juniper Products Co.	17,500	Collect, or get security.
W. W. Bender	3,520	Collect.
Wm. Caldwell	400	Get security.
Carney & Maloney	500	Reduce.
Chocolate Truffles Co.....	5,721	Collect.
A. C. Churchill.....	1,800	Get Mrs. Churchill's signature and secure.
[341—11]		
E. J. Clough	32,300	Collect.
Columbia Creosoting Co...	10,500	Collect from guarantors.
R. G. E. Cornish	2,700	Reduce.

John & J. E. Cronin.....	11,465	Reduce.
G. L. Davenport	5,810	Reduce.
J. L. Donnolly.....	100	Collect.
A. L. Gage	3,500	Reduce.
Fannie L. Hamilton	340	Reduce.
T. Todd Hazen	225	Collect.
Elizabeth Heimbach	6,000	Collect.
A. M. Howell	3,050	Reduce.
N. F. Johnson	500	Collect.
J. Fred Larson	3,062	Collect.
E. C. Mears.....	300	Collect.
National Umbrella Mfg. Co.	802	Charge off.
Oregon State Farm Bureau	5,500	Collect.
C. W. Pallett	12,000	Collect.
J. M. Rieg	5,500	Reduce.
J. R. Thompson	200	Collect.
Toke Point Oyster Co.....	40,000	Reduce.
Wm. Umdenstock	1,500	Reduce.
Universal Tire Filler Co...	3,200	Reduce.
W. A. Williams	1,000	Reduce.

Overdrafts.

Overdrafts at the close of business on November 13 are excessive and should be collected.

Liquidation of the claim against the Merchants National Bank.

This matter should be brought to an early conclusion.

Large Lines and Slow Loans.

Large lines and slow loans as shown in the Ex-

aminer's Report of June 30 should have the careful attention of the officers and reductions should be made until placed in good condition.

Expense Accounts.

We wish to commend the officers on the reduction of approximately $40,000 per annum in the operating expenses of the bank.

Respectfully yours,

(Signed) A. D. CHARLTON.
PHIL METSCHAN.
GEO. H. KELLY."

On the 16th day of January, 1923, M. C. Wilde, National Bank Examiner, was present at the meeting of the board of directors consisting of Price, Olmstead, Charlton, Pittock, Menefee, Skinner and others, and at his request a letter signed by the directors present was addressed to the Honorable [342—12] Comptroller of the Currency, Washington, D. C., reading as follows:

"At a meeting of the board of directors of the Northwestern National Bank of Portland, held on this date with Examiner M. C. Wilde, the general condition of the bank and the following matters of criticism were fully considered—slow and doubtful assets aggregating $4,426,666.04 and $539,418.44, respectively, and estimated losses, $143,894.36.

Of the losses estimated $125,183.20 has been charged off. This includes all losses estimated in the Examiner's report, excepting $17,641.30 on a note of the Alaska Pacific Navigation Company. Unless this note is secured within ninety days, it will be eliminated.

Statutory bad debts $285,499.57, and other overdue paper, $1,873,579.32, are having proper and careful attention of officers and Discount Committee. A sincere effort will be made to dispose of the illegal real estate bonds, other real estate owned, and stocks carried over a five year period. Certificates of information will be attached to all real estate loans, and other matters pertaining to the improvement of our credit files will have proper and careful attention.

Directors are co-operating with the officers, and a united effort is being made to eliminate matters of criticism and improve the general condition of the bank." (R., 48, 49.)

This letter was transmitted on the 16th day of January, 1923, to the Comptroller by vice-president Mark Skinner, the witness on the stand.

Thereafter on June 21, 1923, the board of directors held another meeting with Examiner M. C. Wilde and addressed the following letter signed by the persons named to the Honorable Comptroller of the Currency at Washington, D. C., that is to say:

"June 21, 1923.

Hon. Comptroller of the Currency,
Washington, D. C.

Sir:

At a meeting held June 21st with Examiner M. C. Wilde, careful consideration was given by the undersigned directors of the Northwestern National Bank of Portland, Oregon, to all matters of criticism contained in the Examiner's report of exami-

nation of this bank, now under examination. [343—13]

Losses aggregating $102,947.77 were charged off during the examination.

Slow Assets aggregating $3,757,066.77, doubtful assets $426,756.25, statutory bad debts $1,020,068.72, other overdue paper $711,396.01 and the Merchants National Bank, liquidating account, totaling $484,-699.34 listed undesirable in the report were considered in detail. These matters are having careful attention of officers and directors and efforts will be continued to improve this condition and reduce these amounts.

Large lines and other loans especially mentioned by the Examiner were called to our attention.

It is hoped to fill the three existing vacancies in the board of directors within thirty to sixty days.

The two unlawful real estate loans were eliminated during the examination, and the real estate bonds listed as unlawful will be eliminated shortly. Certificates of appraisal or information properly executed will be attached to real estate loans.

Our credit files have been improved since the previous examination and effort will be devoted toward a further improvement.

We shall endeavor to secure an appraisal on the assets of the Merchants National Bank not later than July 31st, which when completed will be submitted to your Examiner with a recommendation as to the action we desire taken concerning the same.

No dividends will be declared until the condition of the bank is materially improved and additional losses sustained will be charged off as rapidly as determined.

Assurance is given that directors and officers are co-operating in their efforts to improve the condition of the bank.

Respectfully,

GEO. H. KELLY	(Signed)	C. K. SPAULDING
PHIL METSCHAN	(Signed)	M. SKINNER
A. L. CHARLTON	(Signed)	O. L. PRICE
F. F. PITTOCK	(Signed)	EMERY OLMSTEAD
CHAS. H. STEWART	(Signed)	(R., 53, 54)."

Thereafter on August 21, 1923, the Examining Committee consisting of Metschan, Spaulding and Charlton made the following particular report:

"August 21, 1923.

To the Board of Directors The Northwestern National Bank of Portland, Portland, Oregon.

Gentlemen:

We, your Examining Committee, appointed at the annual meeting, beg leave to report that on August 13th to 21st, 1923, we made a full and careful examination of the affairs of this bank as of date August 13. [344—14]

We counted the cash, examined the bonds and all other securities; we checked the notes, collateral and real estate, checked the outstanding and certified checks, cashier's checks, time and demand certificates of deposit and overdrafts; we verified the outstanding stock certificates, verified the first clearings, examined the Expense Account and general

affairs of the Bank, making a full and careful examination of same. We found the books correct.

We recommend as follows:

Notes.

States Auto & Truck Company..	11,108.60	Get report from Wehrung. Take no more contracts.
C. D. Butler	300.00	Collect.
Commercial Corporation	900.00	Reduce.
E. J. Clough	32,794.18	Collect or get security.
Columbia Creosoting Company	10,000.00	Collect from guarantors.
G. L. Davenport	5,600.00	Collect.
Jos. M. Rieg	4,900.00	Collect.
Chas. C. Rose	6,200.00	Collect or get security.
W. U. Sanderson	5,000.00	Collect or secure.
W. H. Sanford	1,050.00	Collect.
George Scroggin	500.00	Collect.
Isaac Staples	32,500.00	Reduce.
Toke Point Oyster Co.....	40,000.00	Collect.
C. A. Macrum	4,600.00	Collect.
Oregon State Farm Bureau...	5,500.00	Collect.
Equity Discount Company....	4,700.00	Collect.
R. L. Gage	2,000.00	Reduce.
Herbert Gordon	5,800.00	Collect.
J. W. Hall	900.00	Collect.
Victor Invention Company....	1,300.00	Collect.
Baldwin Sheep Company.....		Have loan secured by Chat. Mtg.

Overdrafts.

Overdrafts at the close of business on August 13th should be promptly collected.

Liquidation of the claim against the Merchants National Bank.

This matter is now in the hands of the Comptroller for final settlement.

Large Lines and Slow Loans.

Large lines and slow loans as shown in the Examiner's report of June 22nd are having the careful attention of the officers and in some cases substantial reductions have been made, and we earnestly recommend that further reductions be made as soon as possible. [345—15]

Expense Accounts.

We note a further reduction during the first six months of 1923 as compared with the first six months of 1922 of $16,800.00 which is very satisfactory when you take into consideration that a reduction of $40,000.00 was made in the year 1922, inasmuch also as the Bank has made a gain in net profits of $87,000.00 over the corresponding period of the year 1922.

Respectfully yours,

(Signed) PHIL METSCHAN.
CHAS. K. SPAULDING.
A. D. CHARLTON."

(R., 107–107–109.)

Thereafter on December 18, 1923, the Examining Committee consisting of Metschan, Spaulding and Charlton made the following particular report:

"December 18, 1923.

To the Board of Directors of The Northwestern National Bank of Portland, Portland, Oregon.

Gentlemen:

We, your Examining Committee, appointed at the annual meeting, beg leave to report that on December 10th to 18th, 1923, inclusive, we made a full and careful examination of the affairs of this bank, as of date December 10th.

We counted the cash, examined the bonds and all other securities; we checked the notes, collateral and real estate; checked the outstanding and certified checks, cashier's checks, Time and Demand Certificates of Deposit and overdrafts; we verified the outstanding Stock Certificates, verified the first clearings, examined the Expense Account and general affairs of the Bank, making a full and careful examination of same. We found the books correct.

We recommend as follows:

Notes.

Miniature Lumber Co....	2,805.00	Collect.
Saari Bros. Lbr. Co.....	3,765.35	Expedite settlement
J. W. Biggs.....	3,000.00	Collect.
Baldwin Sheep Co.....	222,000.00	Get security.
Berkeley Investment Co..	12,800.00	Reduce.
Neil J. Boyle.....	100.00	Charge off.
C. D. Butler.....	300.00	Charge off.
A. C. Callan	7,000.00	Collect.
E. J. Clough	32,300.00	Collect.
Commercial Corporation.	900.00	Collect.
Columbia Creosoting Co...	10,000.00	Collect. [346—16]
R. G. E. Cornish.....	2,396.00	Reduce.

Equity Distributing Co...	4,200.00	Collect.
A. L. Gage	2,000.00	Reduce.
Herbert Gordon	5,800.00	Collect.
L. D. Johnson	550.72	Collect.
Hamilton Johnstone	66.82	Charge off.
I. J. Kinney	4,938.47	Collect.
T. J. Loiselle	290.40	Charge off.
C. A. Macrum	4,600.00	Collect.
Geo. E. Miller	100.00	Charge off.
L. E. Parshall	600.00	Collect and secure.
Chas. C. Rose.....	6,200.00	Collect.
W. V. Sanderson.....	5,000.00	Collect.
Geo. Scroggin	500.00	Collect.
Vistor Inventions Co....	1,300.00	Charge off.

Overdrafts.

We believe that more care should be exercised in watching accounts which are habitually overdrawn.

Liquidation of the Claim against the Merchants National Bank.

No progress has been made since our last examination. We recommend that the officers take legal action immediately after January 1, 1924, to close the Merchants National Bank Liquidating Account.

Large Lines and Slow Loans.

We find that our officers are making some progress in the reduction of large lines and slow loans; but we believe a better result can be obtained by the organization of a department under a competent head to handle slow and doubtful loans and charged off paper.

Expense Account.

We find that the actual operating expenses during the past five months, as compared with the corresponding months of 1922, show a satisfactory reduction.

Respectfully yours,
(Signed) PHIL METSCHAN.
C. K. SPAULDING.
A. D. CHARLTON."

(R., 110, 111.)

Thereafter and on the 27th of March, 1924, Spaulding and Metschan as the Examining Committee made the following particular report:

"March 27, 1924.

To the Board of Directors of The Northwestern National Bank of Portland, Portland, Oregon.

Gentlemen: [347—17]

We, your Examining Committee, appointed at the annual meeting, report that on March 17th to 27th, 1924, inclusive, we made a full and careful examination of the affairs of this Bank as of date March 17th.

We counted the cash, examined the bonds and all other securities; we checked the notes, collateral and real estate; checked the outstanding and certified checks, cashier's checks, Time and Demand Certificates of Deposit and overdrafts, we verified the outstanding Stock Certificates, verified the first Clearings, examined the Expense Account and general affairs of the Bank, making a full and careful examination of same. We found the books correct.

We recommend as follows:

Notes.

Allen & Hebard	14,000.00	Reduce and get security.
States Auto & Truck Co.	15,000.00	Collect.
Miniature Lumber Co.	2,790.00	Collect from J. S. Boyer.
Berkley Investment Co.	12,800.00	Force Collection.
Denton G. Burdick	18,500.00	Collect.
A. C. Callan	7,000.00	Collect.
G. L. Davenport	5,561.33	Collect.
Equity Distributing Co.	3,700.00	Collect.
A. L. Gage	3,000.00	Collect.
T. T. Geer	15.00	Charge off.
L. Hebard	7,000.00	Reduce and get security.
C. A. Macrum	4,600.00	Collect.
D. M. Pierce	2,900.00	Collect.

Overdrafts.

We note that overdrafts on date of examination are not so large as usual. We recommend that the officers continue to discourage all those who make a practice of overdrawing.

Baldwin Sheep Company.

In our examination of December 18, 1923, we recommend that security be obtained for this loan, which at that time amounted to $220,000.00. We recommend that it be reduced in the sum of at least $200,000.00 between now and July 1, 1924.

Large and Slow Lines.

Progress has been made on these Large Lines and Slow Loans and the department which we

recommend to be organized in our December report is functioning. It is too early for a report to be had from the manager of that department, but an investigation of his work leads us to believe that very satisfactory results will be obtained.

Expense Account.

Expenses for January of this year show a considerable increase over January, 1923, but are satisfactorily accounted for by an increased charge for taxes, advertising and salaries, all of which has been approved. February expense account is slightly under that of February, 1923.

Respectfully yours,

(Signed) CHAS. K. SPAULDING.

PHIL METSCHAN." [348—18]

On the 28th of July, 1924, J. W. McIntosh, Deputy Comptroller, Treasury Department, Washington, D. C., wrote the following letter to the board of directors of the Bank:

"TREASURY DEPARTMENT,
Washington.

July 28, 1924.

Board of Directors
Northwestern National Bank,
Portland, Oregon.

Dear Sirs:

The report of an examination of your bank, completed July 11, a copy of which should be in your possession, has been received, and shows a condition not satisfactory to this office.

Reports of examination of your association since April, 1921, have been carefully reviewed and show that during the intervening time your bank has been subject to continuous criticism because of a constant accumulation of slow and doubtful assets. The following figures will substantiate this statement:

Reports of Examination	Slow	Doubtful
April 1921	$4,932,220	$446,030.
Dec. 1921 & Jan. 1922	4,879,618	457,638.
June 1922	3,188,187	474,706.
Dec. 1922 & Jan. 1923	4,426,666	539,418.
May & June 1923	4,050,114	618,396.
Dec. 1923 & Jan. 1924	4,325,182	596,020.
June 1924 & July 1924	4,346,073	528,410.

During this time the Merchants National Bank liquidating account appears in each report in the following figures:

Report of Examination	
April 1921	$ 449,120.
December 1921	472,137.
June 1922	490,359.
December 1922	468,033.
May 1923	484,699.
December 1923	510,873.
July 1924	535,445.

In the current report $200.00. of the amount is classed as doubtful and it is quite probable that an additional loss will result therefrom. Numerous plans have been proposed, having in view the expediting of liquidation of this account and although efforts have been made to carry them through they

have all been unsuccessful. The account has been at practically the same status for a period of eight years and it is urged that some definite measures now be taken to obtain immediate action from the liquidating committee in the way of relieving your bank of this undesirable account. Please advise what will be done in this connection. [349—19]

The aggregate of slow and doubtful assets, as shown on page twelve, also include items representing judgments, claims, etc., carired on bond securities, recovery depending on liquidation, the outcome of which is not known, and "other real estate" which has been acquired in satisfaction of debts previously contracted.

The examiner is rather encouraging along this line, stating that both officers and directors appear to be doing everything possible to remedy conditions; and that a more conservative policy of granting loans has been adopted and that no new loans of slow or doubtful character are being made. This office desires, however, to urge the management to even greater efforts and to impress upon the directors and officers the fact that energetic efforts and vigorous methods seldom fail to accomplish a great deal. It is hoped by the time of the next examination that the collectibility of paper now held will be definitely demonstrated and that its character will have been improved to an extant which will result in a minimum of loss to the bank.

Particular attention is directed to the following

lines and it is urged that they be substantially reduced by the time of the next examination.

Dufur Farm and Fruit Co. ..... $524,746.
(All listed as slow, large loss probable unless orchard is disposed of. Deal now pending for disposition)

Bankers Discount Corporation ..... 770,112.
(Shows an increase since last examination and is all listed slow or doubtful. Loss probable)

Pacific Grain Co. ..... 441,122.
(All listed slow and loss probable)

C. S. Hudson, et al. ..... 244,543.
(Large part listed as slow, some doubtful in bad debts)

Northwest Fruit Products Company and Phez Company ..... 192,000.
(All listed slow and doubtful)

J. E. Wheeler, interests ..... 584,500.
(All listed slow in current and overdue paper)

This office desires to keep in close touch with the situation and in order to do so requests that you forward reports on the thirtieth of each month, beginning August 30, until otherwise advised, showing the progress made in collecting or otherwise satisfactorily adjusting all slow and doubtful loans and other assets included in the examiner's classification of slow and doubtful throughout the report.

In your first report please also advise what arrangements has been made to expedite liquidation of the Merchants National Bank account and

whether any results have been obtained up to that time.

Respectfully,
(Signed) J. W. McINTOSH,
Deputy Comptroller."

(R., 62, 3, 4, 5.) [350—20]

Thereafter the action of the Board on this matter was August 20, 1924, at which were present Olmstead, Metschan, Spaulding, Pittock, Stewart, Skinner, and among other things,—

"The official copy of the Examiner's Report of the condition of the Bank as of date June 14, 1924, was presented to the directors, and letter of the Chief National Bank Examiner, transmitting same, addressed to the board of directors in connection with said report was read by the secretary.

A letter from the Comptroller of the Currency dated July 28, 1924, addressed to the board of directors relative to matters referred to in the recent report of the National Bank Examiner was read to the board." (R., 58.)

And at this meeting also the following proceedings took place:

"Mr. Olmstead brought up for discussion the purchase by the bank from the Northwestern Fidelity Company of the Bank building, and furnished the directors with a statement showing the cost of the building, the estimated purchase price, and the net earning. After considerable discussion Mr. Kelly made a motion which was supported by Mr. Spaulding, authorizing the directors to negotiate with the stockholders of the Northwestern Fidelity

Company, keeping in mind the following contingencies:

1. To receive from the Comptroller of the Currency permission to purchase the building by the Bank.

2. To arrange with the Pittock Estate to purchase their preferred stock of four thousand shares, at par value, or $400,000 with the understanding that such common stock as they may own would be included without cost to the Bank.

3. To purchase from the Kamm Estate 750 shares of preferred stock at par value or $75,000.

4. To secure the remaining common stock outstanding at a price not exceeding fifty cents on the dollar, of its par value.

5. To purchase from the Pittock Estate such notes as they may hold, signed by the Northwestern Fidelity Company, at face and accrued interest.

6. To have the Pittock Estate agree to take out of the Bank's assets the notes of the Baldwin Sheep Company, the amount to be deducted from the proceeds of the sale of the building company stock and notes.

7. It was understood that the president of the Bank would submit this proposition to the directors who were present, and get their approval [351—21] of the plan, before negotiations were started. The motion was unanimously carried.

There being no further business to come before the meeting, it duly adjourned.

EMERY OLMSTEAD,
Chairman.

M. SKINNER,
Secretary."

Thereafter on September 8, 1924, the board of directors replied to this letter of the Comptroller as follows:

"September 8, 1924.

Honorable Comptroller of the Currency,
Washington, D. C.

Sir:

In accordance with your letter of July 28th, we list below payments and reductions made in connection with various items noted in the Examiner's recent report of the condition of this bank.

Statutory Bad Debts and other Overdue Paper:		
Note M. L. Jones, reduced		392.5
Note R. N. Elliott, paid by Acceptance of note of certain individuals, which note is secured		11,138.0
Note Pacific Grain Co. Paid in full		12,127.3
Note Miller Bros. Grain Co.	Reduced	8,527.5
Note Portland Wool Whse. Co.	Reduced	377.8
Note D. M. Stuart	Reduced	1,120.0
Note G. F. Tucker	Reduced	191.6
Note J. H. Dobbin	Reduced	392.5
Note Donald W. Green	Reduced	389.5
Note C. L. Davenport	Reduced	155.4
Note First State & Savings Bank, Klamath Falls, Ore.	Reduced	604.5

ote C. S. Harper and R. P. Bowman	Reduced	300.00
ote, Reedsport Lumber Co.	Reduced	2,285.00
low and Doubtful Paper:		
ote R. G. E. Cornish	Reduced	50.00
ote Northwest Livestock Loan Co.	Reduced	5,301.87
ote Equity Distributing Co.	Reduced	380.00
ote Charles E. McCulloch and Donald W. Greene	Reduced	400.00
ote J. G. Megler & Co.	Reduced	5,000.00
ote Northwestern Fidelity Co.	Reduced	17,000.00
otes Davin Michellod Sheep & Land Co.	Reduced	32,500.00
ote Edgar B. Piper	Reduced	200.00
hez Co. Certificates of Indebtedness Series "B" (Listed under 'Large Lines')	Reduced	25,000.00

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ther Loans Especially Mentioned		
ote Arthur Anderson Fish Co., Paid		10,000.00
ote Margaret Burrell Biddle	Reduced	16,000.00
ote First Bank of Council, Ida.	Reduced	5,900.00
ote Charles H. Greeley	Reduced	489.90
ote Miller, Calhoun, Johnson Co.	Reduced	20,000.00

Referring to your comments on the Merchants National Bank Liquidating Account,—in the Fall of 1922, our Board had a conference with your Examiner, Mr. Wilde, and suggested to Mr. Wilds that some action by the Department be taken to close the account, and we think Mr. Wilde so advised the Department. During November of 1922, Mr. Olmstead, President of our Bank, called on Deputy Comptroller Kane, who stated that the Comptroller's Department would take the matter up with the liquidating Committee of the Merchant's Na-

tional Bank through Examiner Wilde, and have the assets sold and the assessment levied. We know that Mr. Wilde worked with the Liquidating Committee for some six or nine months to bring about a settlement. Since then we have not been advised of any action. Mr. Olmstead, our President, will be in Washington sometime in October, and will call on you and discuss the matter at that time.

All items listed in the Examiner's report as losses, aggregating $99,019.90, have been charged to Profit and Loss.

All other matters especially mentioned in your report are having the continued attention of the Directors and Officers of the Bank.

Respectfully,

(Signed.)

EMERY OLMSTEAD.	M. SKINNER.
A. D. CHARLTON.	C. K. SPAULDING.
F. F. PITTOCK.	CHAS. H. STEWART.
O. L. PRICE."	PHIL METSCHAN."

(R., 66–7–8.)

On October 14, 1924, the Examining Committee consisting of Spaulding, Charlton and Metschan made a special report as follows:

"October 14, 1924.

To the Board of Directors of The Northwestern National Bank of Portland, Portland, Oregon.

Gentlemen:

We, your Examining Committee, appointed at the annual meeting, report that on September 29th to October 14, 1924, inclusive, we made a full and

careful examination of the affairs of this bank as of date September 29, 1924.

The cash was counted under our direction; we examined the bonds and all the other securities; we checked the notes, collateral, and real estate; checked the outstanding and certified checks and cashier's checks, Time and [353—23] Demand Certificates of Deposit and Overdrafts. We verified the outstanding stock certificates; verified the first clearings; examined the Expense Account and general affairs of the Bank, making a full and careful examination of the same. The books we found to be in balance.

We recommend that the following be requested to reduce their notes:

Allen & Hebard	14,000.00
Berkeley Investment Company	12,800.00
Cartozian Brothers	75,000.00
Cascade Construction Company	2,500.00
Cascade Investment Company	2,500.00
F. B. Layman	6,500.00
C. D. McCoy	500.00
Miniature Lumber Company	2,700.00
Equity Distributing Company	3,700.00
L. Hebard	7,000.00
O. M. Pierce	2,900.00

We recommend that the following notes be collected, using the Courts if necessary.

Albatross Metal Furniture Co.	13,802.73
G. L. Davenport	5,561.33
A. C. Callan	7,000.00
A. L. Gage	3,000.00

C. A. McCrum 4,600.00
States Auto & Trust Company 15,000.00

We especially recommend that J. E. Wheeler be requested to pay the various notes held by this bank, on which he is either the endorser or maker, or that all of his line be secured.

Overdrafts.

We note that the overdrafts on the date of the examination were unusually large. We recommend that the officers, in order to discourage all those in the habit of such practices, notify them by mail that items drawn on this Bank with no provision made to meet them will be dishonored.

Large and Slow Lines.

Some progress has been made in the reduction of the large lines and slow loans, and we recommend that the Collection Department, which was started at our suggestion, make monthly reports to the Board of Directors.

Expense Account.

Our examination of the above account leads us to believe that expenses are being held down, and that the bank is being operated as conservatively as can be expected.

Respectfully yours,
(Signed) CHAS. K. SPAULDING.
A. D. CHARLTON.
PHIL METSCHAN."

(R., 116–7.)

And on the 14th of October, 1924, that also re-

ported to the Board of Directors as follows: [354—24]

"October 14, 1924.

To the Board of Directors of The Northwestern National Bank of Portland, Portland, Oregon.

Gentlemen:

In examining the affairs of this bank covering the period from September 29th to October 14, 1924, we beg leave to report as follows:

Deposits on September 29, 1924, totalled $19,011,900.21. Details of the deposits are given, herewith:

	3–17–24	9–29–24
Commercial Accounts..	9,500,966.59	9,917,102.54
Public Money	1,306,182.00	725,000.00
Savings Accounts	5,096,341.79	5,421,603.82
Bank Accounts	2,669,331.70	2,948,193.85
Total Deposits	18,572,822.08	19,011,900.21
Increase	439,078.13	
	19,011,900.21	

These figures reveal a very satisfactory growth, even with the loss in deposits of $725,000 of public money, we have made a net gain of $439,078.13; and on this date our net gain is much larger than that,—$1,700,000 above the last call.

There are in the employ of the bank 126 persons, with a monthly payroll of $24,676.65. Our monthly light and rent bill amounts to $3,798.05. Furniture and fixtures are being charged off at the rate of $1,000 a month, and at the present time are being

carried on our books at $33,000. Among the large items of expense and bank operation is interest paid on various accounts; herewith a tabulation; Amount of interest paid, and amount set aside monthly for Savings.

	March.	September.
Account	11,238.24	11,790.79
Interest Paid on Commercial Accounts	1,764.73	2,365.04
Int. Paid on Public Money	2,923.28	1,906.73
" " " Spruce Account	730.56	829.71
" " " Time Certificates	451.10	236.44
" " " Bank Accounts	3,388.36	3,679.82
" " " B/P R/D and Diff. Res.	262.29	
Texas (1923)		56,000.00
Donations (Six months' period)		3,500.00
Traveling Expenses (6 months' period)		3,000.00
Gross Income (6 months' period)		483,000.00
Gross Expense (6 months' period)		390,000.00

We have a Collection Department operated at the cost of $1,200.00 a month, under the management of Mr. William Kennedy. We have never had a report from this department, because we realized that it would take six or seven months to get the department under way; but we recommend that in the future monthly reports of the results of the work done by Mr. Kennedy and his staff be reported to this Board. [355—25]

"The bank owns real estate valued at $156,488.72, which we believe to be a conservative valuation; but

the liquidation of this asset is very slow, and an increased effort should be made to dispose of it.

We have notes, claims, bonds, etc., totalling nearly $2,000,000, which are nonproductive. We do not believe that there will be any considerable loss from these accounts, but recommend that some plan be devised by the officers and board of directors to speed up their liquidation.

In our last examination we found that there were slow loans in the bank amounting to $3,600,000 on which reductions in the amount of $128,774.98 have been made during the last six months.

There are a number of customers of the bank having combined loans amounting to $2,000,000 whose balances are not compensating. We recommend that they be required to carry adequate balances.

Respectfully yours,

(Signed) CHAS. K. SPAULDING.
A. D. CHARLTON.
PHIL METSCHAN."

(R., 118–19—20.)

On the 9th of April, 1925, E. W. Stearns, Deputy Comptroller, wrote the Board of Directors of the Bank as follows:

"TREASURY DEPARTMENT,

Washington.

April 9, 1925.

Board of Directors,

Northwestern National Bank,

Portland, Oregon.

Dear Sirs:

The report of an examination of your bank, completed February 24, 1925, a copy of which should be in your possession, has been received, and has been compared with the report of examination completed July 11, 1924.

In office letter of July 28, based on the July report, comparisons were submitted for your consideration, showing the lack of progress evidenced in improving the bank's condition from the standpoint of unsatisfactory assets from examination to examination since 1921.

A comparison of the February with the July report, it is note with satisfaction, shows progress from this standpoint, total loans having been reduced approximately $888,000, and a smaller proportion thereof being classed as slow and doubtful. The amount of adversely classified loans, and other assets, however, is still entirely too large, doubtful alone amounting to more than surplus, undivided profits and reserve accounts. Losses estimated by the examiner in the amount of $381,-043.61, charged off during examination, [356—26] largely impaired surplus. It is, therefore, quite

necessary that there be no relaxation of efforts along the line of affecting collections, or other satisfactory adjustments, of the assets included in these classifications. The examiner again reports that the management is working earnestly to improve the bank's condition, and it is not doubted that an even greater degree of improvement will be shown at the time of the next examination. You, of course, recognize the importance of improving the character of paper which cannot be collected to an extent which will preclude the necessity of calling it a loss when the bank is next examined.

Your failure to effect any change in the Merchants National Bank liquidating account is most disappointing. It is not understood why you are willing to permit this item to remain in the bank from examination to examination, subjecting it to continuous criticism. It would seem that the directors would be desirous of relieving the bank of this asset, and at the same time from the constant criticism which it incurs. It is again urged that some definite action in this matter be taken immediately.

In office letter of July 28, several large lines were listed for your particular attention, with the recommendation that they be substantially reduced prior to the next examination. It is observed, on comparison, that reductions have occurred in the Bankers Discount Corporation line, the C. S. Hudson line, and the Dufer Fruit and Farm Company line, while the Northwest Fruit Products Company and the J. E. Wheeler lines have been increased.

All of these lines should continue to have your close attention, with a view to obtaining further reductions within the next few months. Attention should also be given other lines listed at supplemental sheet 6, and substantial reductions obtained wherever possible.

The Pacific Grain Company Line, in the previous report, shown at $441,122. comprising various notes of different companies, and listed as a large line, it is reported, has been converted into stock of the Davin Michelled Sheep and Lamb Company, in the amount of $273,259.97, and *and* a direct note of $70,500 of the company. The note, the examiner states, will be worked out this year from sales of lambs and wool. The liquidation of the $273,259.97 item, carried in bonds, securities, and representing the total issue of stock of the company, depends upon the sale of the ranch. It is hoped you will be successful in realizing on this stock within a reasonable time.

The examiner, in a separate advice, has informed this office of the purchase of your new bank building since the previous examination. It appears that this property was placed on the books at a value in excess of the purchase price, and that the excess was used with other undivided profits in charging off estimated losses. A letter of appraisal, from a realtor in Portland, has also [357—27] been submitted, stating that the valuation of the premises in its entirety is $2,500,000. While no question is raised as to the soundness of this statement, you are advised that the generally accepted policy, and

the one advocated by this office, is to carry real estate at conservative figures, and preferably that it be under valued than over valued. You are, therefore, requested to give this item such attention as is necessary in line with this idea.

It is desired that you continue forwarding monthly reports, beginning April 20, showing the changes effected in all loans set up throughout the report of examination, and that you attach to each report a copy of your daily statement as of the date the report is written. In addition to containing information in regard to changes effected in adversely classified loans, the reports should contain advice as to the progress made in improving the bank's condition along other lines, and your first report should state definitely what action will be taken in regard to the Merchants National Bank liquidating account.

The examiner, in a separate communication, advises that President Olmstead contemplates another visit to this office during which he proposes to again urge the appointment of a Receiver for the Merchants National Bank. Whatever business may call Mr. Olmstead to this office, he may feel confident that he will be accorded a courteous reception. His attention is invited, though, to office letter of January 14, wherein he was informed that the Comptroller was unwilling to appoint a receiver for the Merchants National Bank, until and unless a judgment has been obtained against that association. You are now respectfully informed that the decision of the Comptroller expressed at that time is final

and that a receiver will not be appointed unless a judgment is obtained.

Respectfully,

(Signed) E. W. STEARNS,

Deputy Comptroller."

(R., 71–2–3–4.)

Upon this the Board of Directors held a meeting on the 15th of April, 1925, and the following action took place:

"The official copy of the Examiner's Report of the condition of the bank as of date February 2, 1925, was presented to the Directors, and letter of the Chief National Bank Examiner, transmitting same, addressed to the Board of Directors in connection with said Report, was read by the secretary.

A letter from the Comptroller of the Currency dated April 9, 1925, addressed to the Board of Directors, relating to matters referred [358—28] to in the recent report of the National Bank Examiner was read to the Board." (R., 69.)

Thereupon on the 21st of April, 1925, the board of directors made reply to the Comptroller of the Currency as follows, to wit:

"April 21, 1925.

Hon. Comptroller of the Currency,

Washington, D. C.

Sir:

Below please find memoranda of payments and reductions made up to April 20, 1925, in connection with loans referred to in the Examiner's report of

the condition of this bank as of date February 2, 1925:

Statutory Bad Debts and Other Overdue Paper:

te of D. M. Stuart, balance paid	36,240.00
te of C. S. Hudson, et al. Reduced	500.00
te of Deschutes Investment Co. Reduced.....	5,000.00
te of J. G. Megler & Co. Paid.....	4,500.00
ow and Doubtful Paper:	
te of Allen & Hebard Co. Reduced	3,000.00
te of Bankers Discount Corp. Reduced.....	576.42
te of J. R. Blackaby, reduced	3,000.00
te of Charles H. Greely, reduced	500.00
te of C. S. Harper and R. P. Bowman, Paid...	1,900.00
te of Portland Storage Battery Co. Paid	7,000.00
te of F. H. Gaulke, reduced	3,180.46
te of State Bank of Metolius, Ore. Reduced...	3,500.00
te of Northwest Auto Co. Reduced	187.50
te of Edgar B. Piper, reduced	250.00
te of Redmond National Bank, Redmond, Ore. Reduced	2,140.10
te of Reedsport Lumber Co. Redmond	136.63
rge Lines:	
te of Pittock & Leadbetter Co., Paid	52,500.00
te of F. W. Leadbetter, Paid	150,000.00
her Loans Especially Mentioned:	
tes of Baldwin Sheep Co. Reduced	165,000.00
te of W. S. Boss, Paid	1,500.00
te of Fag-O-San Sales Co. Paid	1,390.00
te of Etta L. Higgins, Paid	1,000.00
tes of Geo. L. and J. A. McPherson, Reduced...	1,300.00
tes of Oregon Pulp & Paper Co. Reduced	10,000.00

Note of M. Sanders & Co. Reduced	7,500.00
Note of Titus Mfg. Co. Reduced	2,500.00
Notes of Willamette Valley Lbr. Co. Reduced.....	48,860.00

All matters referred to in the Examiner's Report, especially the larger lines and doubtful paper, together with the recommendations contained in your letter of April 9th, are now having and will continue to have the attention of the Officers and Directors of the Bank. [359—29]

Relative to the indebtedness of the Merchants National Bank, for your information we enclose copy of letter addressed to the Liquidating Committee of said bank under date of March 19th. The plan outlined in this letter is now having the consideration of the committee in charge of the Merchants National Bank affairs, and it is anticipated that we will have a definite reply to our proposal on or before June 1st. In any event it is our intention to bring this matter to a final conclusion at the earliest possible date.

Enclosed please find copy of daily balance sheet, as of date April 20, 1925, as requested.

Respectfully,

(Signed)

EMERY OLMSTEAD.	A. D. CHARLTON.
PHIL METSCHAN.	CHAS H. STEWART.
O. L PRICE.	M. SKINNER.
C. K. SPAULDING.	F.F. PITTOCK."

(R., 76, 77.)

On the 18th of May, 1925, directors Metschan, Charlton and Spaulding as the Examining Com-

mittee reported to the board of directors as follows:

"May 18, 1925.

To the Board of Directors The Northwestern National Bank of Portland, Portland, Oregon.

Gentlemen:

We, your Examining Committee, appointed at the annual meeting, report that on April 27th to May 9th, 1925, inclusive, we made a full and careful examination of the affairs of this bank as of date April 27th.

We counted the cash; we examined the bonds and all other securities; we checked the notes, collateral and real estate; checked the outstanding and certified checks, Cashier's checks, the time and demand certificates of deposit and overdraft; we verified the first clearings; examined the Expense Account and general affairs of the bank, making a full and careful examination of same. We found the books correct.

We recommend that the following be requested to reduce their notes:

Allen & Hebard	15,000.00
J. G. Arnold	6,500.00
Berkeley Investment Co.	10,696.25
Carleton Inv. Co.	3,500.00
Hauser Bros.	19,500.00
Miniature Lumber Co.	2,672.12
Lockwood Hebard	7,000.00
W. U. Sanderson	5,000.00

On the Hudson, Sather and Ellis notes we recommend that accounts owing to us and guar-

anteed by Hudson, Sather and Ellis be collected and that the guarantors be notified that substantial reductions [360—30] must be made each month.

We also recommend that the Glenn E. Miller indebtedness of $42,900.00 be charged down twenty per cent.

Large and Slow Lines.

Substantial progress has been made in the reduction of Large and Slow Lines, all of which we have carefully investigated. Satisfactory collections have been made of accounts heretofore charged off, but every energy of the organization should be put forth to hasten the liquidation of these lines as rapidly as possible in order to put the bank on a dividend paying basis.

Respectfully Yours,
(Signed) PHIL METSCHAN
A. D. CHARLTON.
CHAS. K. SPAULDING."

(R., 121, 2.)

On October 23, 1925, the board of directors wrote the Comptroller of the Currency as follows:

"October 23, 1925.

Hon. Comptroller of the Currency,
Washington, D. C.

The undersigned directors of the Northwestern National Bank met October 23, 1925, with Chief National Bank Examiner, Mr. E. E. Harris, and National Bank Examiner, Mr. M. C. Wilde, at which meeting there was discussed and called to our attention the various matters of criticism, and the

unfavorably classified assets shown in the recapitulation of the Examiner's report completed as of this date.

The undersigned directors have assured your Examiners that from their own and personal knowledge, or from reports and information furnished them, that are believed responsible and reliable, the value of assets acquired from the Merchants National Bank, now carried on the bank's books at $498,948.04, is in excess of the carrying figures, and of sufficient value to protect the bank against further loss in this account, notwithstanding the statement contained in President Olmstead's letter dated August 1st, 1923, addressed to your Examiner, giving a much lower valuation at that time, and noting the Examiner's statement to the directors that he does not share the Directors' optimistic view concerning the valuation placed on these assets.

In accordance with our agreement with your Examiners, we will continue to apply our profits as earned to retire the balance of the paper listed as losses in the Examiner's report. Furthermore we have exercised an option for the sale of our banking house, which, if exercised, will yield a profit of over $200,000. When this profit is realized, it will be applied on the Examiner's estimated doubtful paper.

Serious consideration will be given to the suggestion and recommendation of your Examiners that a [361—31] corporation be organized among the shareholders of the bank for the purpose of pur-

chasing as much as possible of the non-income producing assets.

Assurance is given that the management and directors of this bank will continue their earnest endeavors to place this bank in a more satisfactory condition, and serious consideration will be given to all suggestions offered by your Examiners, for the welfare and benefit of the bank.

Respectfully,

(Signed)

CHAS. H. STEWART. F. F. PITTOCK.
NATT McDOUGALL. EMERY OLMSTEAD.
A. D. CHARLTON. O. L. PRICE.
PHIL METSCHAN. M. SKINNER.
CHAS. K. SPAULDING."

(R., 140, 41.)

On November 17, 1925, the Comptroller of the Currency wrote the Board of Directors as follows, to wit:

"TREASURY DEPARTMENT,

Washington.

November 17, 1925.

Board of Directors,
Northwestern National Bank,
Portland, Oregon.

Dear Sirs:

The report of an examination of your bank, completed on October 23, by National Bank Examiner M. C. Wilde, has been received and, as you will note by the copy which should be in your hands, assets classified as slow, doubtful or as losses amount

in the aggregate to $4,498,919.21. Estimated losses, however, are less than $177,000, and if it were certain they were not larger no concern would be felt regarding the situation. Among doubtful assets listed at $534,000, and slow assets listed at $3,788,000 there are certain, however, to be additional losses.

The records show that during the past five years the bank has charged off losses amounting to $1,617,000, and the examiner advises that most of the losses have been sustained upon items that were part of the assets of the bank in 1920. Reports of examinations during that year showed losses of much smaller amount. In other words, the condition of the bank, as reflected by the reports, was much better than the future proved it actually to be.

In 1920 the bank was entering upon the deflation period and it was no more than human to expect a return of improved economic conditions a great deal sooner than they actually came. Such improved conditions were long postponed, however, so that low-grade assets instead of getting better for worse, with the result in your case that losses far exceeded the examiner's estimate. It is probably not necessary to contend with a situation of this sort now and conditions may get better instead of get worse. Whether the business of some of your borrowers, however, notably your sheep raisers, can receive any further [362—32] assistance from improved conditions is a matter of opinion.

Suffice it to say that with sub-standard assets listed by the examiner at 20 per cent of your total re-

sources, losses in the amount he mentioned seem a very conservative estimate. It is thought that the bank will be fortunate indeed if it escapes total losses of several times the amount. The bank has large capital and some surplus, but if all known losses were determined it would not be surprising to find that an impairment of capital existed.

The examiner stated that some consideration was given during the examination to the organization of a separate company with capital of $500,000 to relieve the bank of some of its assets of frozen character, but ultimately collectible. Of course the degree of assistance afforded to the bank by the elimination of this amount of assets would depend upon the character of those removed. If the amount were used to take out actual losses it would be a great deal more helpful than if it were used to take out assets which were slow but which the bank could ultimately collect itself. It is believed, however, that the directors should formulate some plan to take out of the bank a far greater amount of undesirable assets than half a million dollars. When it is considered, as the examiner says, that $1,750,000 of the bank's loans and other assets produce no revenue, its unfavorable effect upon the earnings of the bank, and consequently upon its ability to work out of its present undesirable situation, is evident.

No. 5874

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES)

CHARLES A. BURCKHARDT,

Appellant,

vs.

THE NORTHWESTERN NATIONAL BANK, a National Banking Association, CHARLES K. SPAULDING, PHIL METSCHAN, A. D. CHARLTON, E. S. COLLINS, CHAUNCEY McCORMICK, NATT McDOUGALL, FREDERICK F. PITTOCK, MARK SKINNER, CHARLES H. STEWART, O. L. PRICE, EMERY OLMSTEAD, JAMES F. TWOHY and CHARLES A. MORDEN,

Appellees,

and

FRED A. BALLIN,

Appellant,

vs.

THE NORTHWESTERN NATIONAL BANK, a National Banking Association, CHARLES K. SPAULDING, PHIL METSCHAN, A. D. CHARLTON, E. S. COLLINS, CHAUNCEY McCORMICK, NATT McDOUGALL, FREDERICK F. PITTOCK, MARK SKINNER, CHARLES H. STEWART, O. L. PRICE, EMERY OLMSTEAD, JAMES F. TWOHY and CHARLES A. MORDEN,

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VOLUME II.
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Upon Appeals from the United States District Court for the District of Oregon.

Filmer Bros. Co Print, 330 Jackson St., S. F., Cal.

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The report shows, as previous reports have shown, that many large lines of credit to affiliated interests are still in the bank. It is remembered that to some extent these lines are the result of additional advances made to work out loans already undesirable, but their adverse effect upon the condition of the bank is felt nevertheless.

It is thought that the condition of the institution is more serious than the directors will permit themselves to believe. You are requested therefore, to give the matter very thorough consideration and to endeavor to arrange some plan by which the more dangerous assets may be eliminated. If you are unable to do that, such credit information should be obtained as will enable a more accurate appraisal of the assets than examiners apparently have been able to make in the past.

If such an appraisal should disclose that losses existed in sufficient amount to impair capital, an assessment of the stock could be issued by this office for the purpose of correcting the situation.

On January 5, please report what losses have been charged off since the examination; what slow and doubtful paper has been collected or secured; whether the banking house has been sold under the option existing at the time of the examination; whether overdrafts are being restricted and whether those to directors and their concerns have been collected, and what has been done regarding the other matters brought to the attention of the Board [363—33] and listed for their notice on the sheet

supplemental to page 11. Please forward copies of your letter to Chief National Bank Examiner T. E. Harris, 1103 Alexander Building, San Francisco, California, and National Bank Examiner M. C. Wilde, 238 Central Building, Seattle, Washington. No other special report need be made prior to January 5th.

Respectfully,
(Signed) E. W. STEARNS,
Deputy Comptroller."

(R., 143, 44, 45.)

Thereafter this same committee reported to the board of directors December 23, 1925, as follows:

"Portland, Oregon, December 23, 1925.

To the Board of Directors, The Northwestern National Bank of Portland, Portland, Oregon.

Gentlemen:

We, your Examining Committee, appointed at the annual meeting, beg leave to report that from December 3rd to December 22nd we made a full and careful examination of the affairs of this bank as of date.

We counted the cash, examined the bonds and all other securities; we checked the notes, collateral and real estate; checked the outstanding and certified checks, cashier's checks, and Time and Demand Certificates of Deposit and overdrafts; we verified the outstanding stock certificates; verified the first clearings; examined the Expense Account and general affairs of the bank, making a full and

careful examination of same. We found the books correct.

We recommend the following:

The Bank Examiner recommended at the conclusion of his last examination, that a total of $170,000.00 be charged off; $107,000.00 of this amount has already been charged off, and we recommend the balance covered by his suggestions, approximately $63,000 be charged off as soon as the earnings are available for the purpose.

We further recommend that if the building is sold, negotiations of which are almost concluded, that all the profits arising therefrom, estimated to be $250,000, be used in charging off from the slow and non-productive lines mentioned in the Examiner's Report.

We also recommend that consideration be given to the suggestion of the National Examiners relative to the organization of a company for the purpose of taking over from the bank's assets some of the slow and non-income producing paper.

(Signed) PHIL METSCHAN.
C. K. SPAULDING.
A. D. CHARLTON."

(R., 123, 24.) [364—34]

On January 5, 1926, the board of directors wrote the Comptroller of the Currency as follows:

"January 5, 1926.

Hon. Comptroller of the Currency,
Washington, D. C.

Sir:

As requested in your letter of November 17th,

we herewith make report concerning items listed in your Examiner's report covering the condition of the bank as of date September 30, 1925, viz.:

On October 24, 1925, Profit and Loss Account was debited in the amount of $107,119.66, and on January 5, 1926, in the sum of $62,824.46, covering losses determined by the Board and listed as losses in the Examiner's report. A detailed list of such items is enclosed, herein.

Collections on slow and doubtful paper are as follows:

Note Albatross Metal Furniture Co. reduced.	1,500.00
Note A. O. Anderson, et al., reduced.....	3,600.00
Notes M. L. Jones, reduced.....	27,926.73
Notes Northwest Livestock Co. reduced...	6,806.35
Notes Fred W. Falconer, reduced.....	234.46
Notes Kelly Ranch Co. reduced.....	4,180.45
Note J. H. Dobbin, Paid	3,601.43
Note J. R. Blackaby Commercial Co. reduced	1,000.00
Note Earl Blackaby reduced	100.00
Note Cline Falls Power Co. Paid.....	9,500.00
Notes C. S. Hudson et al., reduced.....	2,864.65
Note W. J. Jamieson, reduced.....	3,300.00
Note Con. O'Keefe, paid.....	11,785.00
Note Bank of Ione, Oregon, reduced.....	1,229.65
Note C. R. Gunzel, reduced.....	90.00
Notes Wilfrid P. Jones (Listed in report as $10,900.00, this indebtedness readjusted by taking over ranch property held as collateral, now carried in "Other Real Estate" at $10,736.14; and note of Wilfrid P. Jones for $2,500.00, covering	

accumulated interest and prior lien on property, now carried in "Bills Receivable" to be paid at the rate of $50.00 per month, first payment having been made.)

Note F. H. Gaulke, reduced	$ 3,657.14
Note J. G. Megler & Co. reduced	500.00
Note J. J. Metzler reduced	216.81
Note Miniature Lumber Co. reduced	109.92
Note Edgar B. Piper, reduced	250.00
Note J. H. Hayes & Son, reduced	6,295.69
Note W. U. Sanderson, reduced	200.00
Note Santiam Woolen Mills, Inc. reduced	2,550.00
Note J. W. Siemens, reduced	1,167.39
Note James F. Twohy, reduced	9,100.00
Note F. E. Veness, reduced	94.00
Note S. L. Vincent, reduced	500.00
Note McCormick Lumber Co., paid	86,500.00

Large Lines.

Note First Bank of Coincil, Ida., reduced	25,000.00
Notes endorsed N. H. Rubottom, reduced	4,600.00
Note Geo. A. Jones, et al. reduced	4,254.37
Notes First Bank of Joseph, Ore., reduced	25,668.34

[365—35]

Note H. B. Davidhizer, paid	1,200.00
Note Dobbin and Huffman, paid	12,000.00
Note F. H. Gaulke, reduced	14,948.37
Notes Northwest Canning Co., reduced	97,969.00
Overdraft Twohy Bros. paid	487.39
Overdraft James F. Twohy, paid	428.12
Note Philip Twohy, reduced	500.00
Overdraft L. R. Wheeler, paid	778.74

Other Loans Especially Mentioned.

Notes Baldwin Sheep Co., reduced	20,000.00
Notes Commerce Co., Redmond	5,000.00
Note C. H. Farrington, reduced	75,000.00
Note J. R. Ridgway, reduced	85,000.00
Notes Geo. L. and J. A. McPherson Corporation, reduced	17,000.00
Notes Miller Calhoun Johnson Co., reduced	52,000.00

Bonds, Securities, etc.

Oregon Land Settlement Commission, paid	6,000.00
Oregon State Farm Bureau Federation, reduced	300.00

Other Real Estate Owned.

The following parcels have been sold: Lots 15 and 16, Block 283, Couch Addition to the City of Portland: Lots 1 and East 18′ of Lot 2, Nob Hill Addition to the City of Portland. 5 lots in Block 4, South Portland.

The sale of our building has not as yet been consummated, and inasmuch as we are receiving 12% on the investment, our Directors are not very keen on the sale. However, they have authorized the sale of the building.

The adjustment of the Merchants National Bank Liquidating Account is having our attention, and the taking over of the assets in accordance with our agreement with the Merchants National stockholders will be completed as soon as the abstracts, covering the real property, have been finally examined by our attorneys. In the meantime, we are negotiating for the sale of some of this property, and

hope to be able to dispose of same ar a price in excess of the appraised value.

The matters under criticism, as summarized on supplemental page 11 of the report, are having the constant attention of both Directors and Officers.

Respectfully,

(Signed) EMERY OLMSTEAD,
CHAS. K. SPAULDING,
M. SKINNER,
CHAS. H. STEWART,
O. L. PRICE,
F. F. PITTOCK,
PHIL METSCHAN,
Directors."

c—c To T. E. Harris,
Chief Examiner.
c/c to M. C. Wilde, Examiner. ?

(R., 147–150.)

Following this the Deputy Comptroller of the Currency on the 26th day of April, 1926, wrote the following letter to the board of directors: [366—36]

"TREASURY DEPARTMENT,
Washington.
April 26, 1926.

Board of Directors,
Northwestern National Bank,
Portland, Oregon.

Dear Sirs:

The report of an examination of your bank, completed by National Bank Examiner M. C. Wilde on

April 6, 1926, has been received and while indicating improvement along some lines, it does not evidence the degree of improvement that was hoped for and which it is thought might have been shown had the management proceeded with collections with the energy which a situation such as yours requires.

Assets classed as slow in the current report amount to $3,734,572.44, including the Merchants Liquidating Account of $498,888.65; while doubtful assets of $513,130.02 are reported, exceeding surplus, undivided profits and reserve accounts, when items of $31,661.79 classes as losses, are taken into consideration.

The examiner has furnished this office with a list of assets, which in his opinion, are uncollectible, but which he states the management will not admit as losses at this time. These assets aggregate $167,-437.73 and it was agreed at the time of examination that profits available June 30 will be used to charge them off. An additional list of assets aggregating $794,580.94 has been furnished this office, which unquestionably contain many potential losses. A large number of the items included in both of these lists are classed as doubtful in the current report. You, of course, understand that you cannot be permitted to carry indefinitely doubtful assets and show and report them as good.

An exhaustive review of past reports at the time of the previous examination forced the conclusion that the condition of your bank is more serious than the directors and management believe and

the current report bears out that conclusion. Unless, therefore, there is a decided change for the better by the time of the next examination in the character of assets classed as slow and doubtful in the last report, it will be necessary to place thereon much lower valuations than have been given in former reports and this, of course, will necessitate a heavy estimate of losses.

It may be that what is needed in your bank, if its affairs are to be rehabilitated to the satisfaction of the examiner and this office, is an entire change in management. It would seem that capable management should have, over a period of years succeeded in relieving the bank's unsatisfactory condition, but your bank has been continuously unsatisfactory since 1920, which indicates conclusively that there is something wrong in the plan of operation. If a change in management is not feasible at this time, the present management should at least be strengthened by some person of energy and ability, who can and will vigorously proceed to realize all that is possible out of the many slow and doubtful loans and other assets that have been [367—37] in the bank for so many years. Please give this matter your very earnest consideration.

The examiner reports that deeds and assignments are now being prepared, by which your bank will acquire title to all of the assets taken from the Merchants National Bank in 1915, a large part of which is real estate. It is proposed, then, to organize a holding company with nominal capital, to take over this real estate, as well as 'other real

estate' owned by the bank and in exchange therefor give the bank stock in the holding company. This stock is to be carried in the 'securities account' or as 'other assets.'

The plan as proposed is not approved and should not be carried out. It cannot be seen where the bank would benefit at all merely from the exchange of 'other real estate' for stock, which will be even less marketable. A holding company does not serve its purpose unless it actually relieves the bank by a cash purchase of assets removed through it.

The necessity for the organization of a holding company, however, with sufficient paid-in capital, to take out of the bank all of the real estate now owned and which it will have title to after the deeds and assignments of that owned by the Merchants National Bank have been completed, cannot be too strongly emphasized, and it is urged that a company be organized in accordance with this plan; also that the elimination through this source of assets other than real estate, which are of questionable character, be arranged.

On June 6, please advise what decision has been reached in this regard and whether you have been successful in selling any of the real estate owned or have prospects for sale.

At the same time state what has been decided in regard to change in management or whether instead you have procured the services of an able collector. Under either circumstances please state what results have been obtained in the way of collection of

slow and doubtful loans and realizing on other slow and doubtful assets up to that time.

A report from you as to what has been done to overcome the other criticisms mentioned on supplemental sheet 11 is also desired and you are requested to attach a copy of your daily statement as of June 6 for comparative purposes, forwarding duplicates of letter and statement to Chief National Bank Examiner T. E. Harris, 1103 Alexander Building, San Francisco, Calif., and National Bank Examiner M. C. Wilde, 238 Central Bldg., Seattle, Wash.

Respectfully,

(Signed) E. W. STEARNS,

Deputy Comptroller."

(R., 129–132.)

The board met in a regular meeting and on the 9th day of May, 1926, transacted the following business: [368—38]

"At a regular meeting of the Board of Directors of the Northwestern National Bank of Portland, held this date, there were present Messrs. O. L. Price, Emery Olmstead, A. D. Charlton, James F. Twohy, C. K. Spaulding, F. F. Pittock, Phil Metschan, Charles H. Stewart, and M. Skinner. Mr. Price presiding.

The minutes of the meeting of the Board held April 21st were read, and on motion of Mr. Twohy, seconded by Mr. Stewart, were duly approved.

The minutes of the Executive Committee *meeting* of April 20th, April 27th, May 4th, and May 11th, respectively, were read, and on motion of

Mr. Olmstead, seconded by Mr. Charlton were approved.

The Examining Committee of the Board of Directors submitted its written report covering the condition of the bank as of date May 6, 1926. The report was accepted and filed.

A letter from the Comptroller dated April 26, 1926, addressed to the Board of Directors, relative to the loans mentioned in the report of Examiner M. C. Wilde, dated April 6, 1926, was read to the Board. On motion duly seconded a committee representing the Board, consisting of O. L. Price, chairman, Emery Olmstead president, and Phil Metschan, director, were requested to call upon the Comptroller of the Currency, Washington, D. C., for the purpose of fully discussing all of the matters referred to in said letter.

On motion of Mr. Olmstead, seconded by Mr. Spaulding, the committee by unanimous vote received that all loans to any one person or concern in excess of $5,000 and not exceeding $25,000 shall be first approved by not less than senior officers or members of the Executive Committee, and that all loans to any one person or concern which in the aggregate are in excess of $25,000, shall first be approved by the Executive Committee.

There being no further business to come before the meeting it then adjourned.

O. L. PRICE, Chairman,
M. SKINNER, Secretary."

(R., 242, 243.)

Thereafter on May 18, 1926, the Examining Com-

mittee consisting of Spaulding, Charlton and Metschan made the following report to the directors of the Bank:

"Portland, Oregon, May 18, 1926.

To the Board of Directors The Northwestern National Bank of Portland, Portland, Oregon.

Gentlemen:

We, your Examining Committee, appointed at the annual meeting, beg leave to report that on May 6th, 1926, started a full and careful examination of the affairs of this bank, which was completed May 18, 1926. [369—39]

We counted the cash, examined the bonds and all other securities, we checked the notes, collateral and real estate; checked the outstanding and certified checks, cashier's checks, the time and demand certificates of deposit and overdrafts; we verified the outstanding stock certificates; verified the first clearings; examined the Expense Account and general affairs of the bank, making a full and careful examination of same. We found the books in balance.

We found during the examination overdrafts totaling $16,367.48. They were well scattered, and we do not anticipate loss on any of them, but we would recommend the closest attention to them.

We find that the bank is being operated as economically as possible, considering the service to be rendered; that the profits are materially greater month by month than during the previous year.

We feel that at the close of the previous exami-

nation by National Bank Examiner Wilde, all proven losses were charged off. There are certain accounts which require closest attention by the officers of the bank to prevent further loss. We believe that these accounts, which are now in the hands of our new Collector, Mr. Kennedy, are being carefully handled.

Crop conditions at this time appear to be exceptionally favorable, and unless unfavorable weather should develop, our surrounding territory should harvest a large crop this year, which would result to our material advantage in the liquidation of loans such as those in the Ione district.

The farm of the Oregon Agricultural Company, which the bank has undertaken to operate during the past three unfavorable years, has now been leased on a crop rent basis, which will relieve the bank of the most of the risk heretofore involved.

The most of the land of the Dufur Orchard Company has been cleared or is in the process of clearing, and this property has also been leased to responsible tenants on a crop rent basis, so that it should be more than self-sustaining.

The transfer of the assets of the Merchants National Bank is now being completed, and our bank will be in a position to offer for sale the various items of real estate so transferred, and liquidation of the account should begin in the near future.

While it is true that too large an amount of the bank's assets are tied up in non-income producing investments, on the other hand, as an offset to this,

the $1,200,000 invested in banking house is yielding a net return of twelve per cent on the investment.

Based on our present earning capacity, the bank should be able, if necessary, to directly charge off a substantial amount of its slow assets within the next two years, and this together with liquidation accomplished, through collections and sales of real estate, should put the bank in a position to resume dividends. We believe that the payment of dividends would contribute more than any other one thing toward the growth and progress of the bank. [370—40]

We wish to compliment the management upon its adopted policy of requiring the approval of three *serion* officers on each loan made in excess of $5,000.

We wish to recommend to the management the closest attention to all items listed as slow or doubtful in the report of National Bank Examiner Wilde, to the end that they may be removed entirely from the Bank in due course.

We believe that with our increased earning capacity and the close co-operation of the officers and directors, the future of the Bank is assured.

Respectfully submitted,
EXAMINING COMMITTEE.
(Signed) C. K. SPAULDING,
A. D. CHARLTON,
PHIL METSCHAN."

(R. 125–127.)

And on May 24, 1926, the board of directors wrote to the Comptroller of the Currency as follows:

"May 24, 1926.

Hon. Comptroller of the Currency,
Washington, D. C.

Sir:

Your letter of April 26th, in regard to Examiner Wilde's recent report, has been received, and all matters referred to therein have had our careful attention.

Particular consideration has been given to suggested plan for handling slow paper and enforcement of collections; also the manner in which the assets of the Merchants National Bank shall be taken over by this bank.

In view of the fact that all of these matters involve much detail, the Board feels that a personal discussion of same with your office will be to advantage, and has, by unanimous vote, requested its representatives Messrs. O. L. Price, Chairman, Emery Olmstead, President, and Phil Metschan, Director, to call upon you for that purpose.

This Committee will reach Washington, Monday June 7th. We trust it will be agreeable and convenient for you to meet with them on that date.

Respectfully,
(Signed)

NATT McDOUGALL.
O. L. PRICE.
E. S. COLLINS.
A. D. CHARLTON,
PHIL METSCHAN.

F. F. PITTOCK.
CHAS. H. STEWART.
M. SKINNER.
CHAS. K. SPAULDING.

(R., 133.) [371—41]

On October 22, 1926, T. E. Harris, Chief National Bank Examiner, 12th Federal Reserve District, wrote the president of the Bank October 22, 1926, as follows:

"Portland, Oregon, October 22, 1926.

Mr. Emery Olmstead, President,
Northwestern National Bank,
Portland, Oregon.

Dear Sir:

As a result of my examination of your Bank as of close of business September 21, 1926 the following schedule is submitted showing amount of assets considered NON–BANKABLE, together with the amount of such assets classed by me as doubtful and losses:

	Non-bankable.	Doubtful.	Losses.
O. A. Anderson, et. al	10,800.00	10,600.00	
J. G. Arnold	5,700.00	5,700.00	
Associated Pictures Corp	439.44		439.44
Bankers Discount Corp	46,708.30	20,000.00	26,708.30
Northwest Livestock Loan Co	50,756.06		31,556.00
Berkeley Investment Co	11,205.67		11,205.67
J. R. Blackaby	15,000.00	15,000.00	
Boulder Creek Lbr. Co	10,759.56		
C. A. Burckhardt	40,000.00	40,000.00	
Burdick Mortgage Co	6,500.00		2,500.00
Denton G. Burdick	7,876.48		7,876.48
A. C. Churchill, Receiver	30,965.68		
A. F. Claus, Jr	750.00		750.00
A. F. Claus & Sons	1,100.00		1,100.00
Dennos Food Co	3,691.33		

	Non-bankable.	Doubtful.	Losses.
Fremont & Everett	3,648.62		3,648.62
Chas. H. Greeley	22,500.00	22,500.00	
Henninger & Ayes Mfg. Co.	1,250.00		1,250.00
M. L. Jones	77,806.64		
Oregon Agricultural Co.	125,000.00	67,733.66	132,072.98
Wilford P. Jones	2,400.00		2,400.00
Kelly Ranch Co.	190,804.64	90,804.64	100,000.00
Chas. E. McCulloch	11,600.00	11,600.00	
W. W. Lloyd	100.00		100.00
Geo. C. W. Low	55,000.00	40,000.00	15,000.00
Miniature Lumber Co.	2,112.20	2,112.20	
B. W. Montgomery	549.20		549.20
A. J. Olson	3,500.00	3,500.00	
Rock Creek Ranch Co.	22,287.38		22,287.38
G. F. Russell	824.11		824.11

	Non-bankable.	Doubtful.	Losses.
Chas. E. Sand	2,000.00	2,000.00	
Security Storage & Tfr. Co.	12,500.00		
J. H. Thatcher	200.00		200.00
Twohy Bros. & Co.	112,500.00		
F. E. Veness	36,838.06		36,838.06
Oswald West	10,140.98		2,640.98
Bank of Ione	183,879.12	15,000.00	45,000.00
O. R. Russell	11,800.00	11,800.00	
First Bank of Council	12,055.42		
C. R. Hudson, et. al.	83,570.03		
[372—42]			
Deschutes Investment Co.	15,000.00		
Northwest Fruit Products Co.	46,470.00		46,470.00
Total Loans	$1,294,088.92	$358,550.50	496,917.28

	Non-bankable.	Doubtful.	Losses.
6% profit sharing bond, Realty Assn. of.. Portland			
($500)	403.25	403.25	
52,400 bonds N. W. Fruit Products Co.....	51,500.00		25,750.00
11,050 bonds N. W. Fruit Union.....	11,050.00		
327,000 bonds Dufur Fruit & Farm Co.....	267,000.00		113,820.00
Reedsport Lbr. Co. (Claim).....	31,038.50		
Stockgrowers Finance Corp.....	640.00	640.00	
12 shs. Puget Sound National Bank.....	1,450.00		
125 shs. Portland Artificial Ice Co.....	46,338.87		
1199 Shs. Boulder Creek Lbr. Co.....	76,490.00		
200 shs. Davin Michellod Sheep & Land Co.	273,259.97		73,259.97
Judgment vs. Oregon Agricultural Co.....	30,874.99	30,874.99	

	Non-bankable.	Doubtful.	Losses.
Judgment vs. J. W. Siemans	35,120.00		
Bi-State Inv. Co.	501,985.55	100,000.00	100,000.00
Total securities	$1,327,151.12	131,918.24	312,928.97
Other Real Estate	145,156.85		
RECAPITULATION:			
Loans	1,294,088.92	358,550.50	496,917.28
Securities	1,327,151.13	131,918.24	312,829.97
Other real estate	145,156.85		
Grand total	$2,766,396.90	490,468.74	809,747.25

Your officers have not concurred in these classifications, however the condition of your institution as I see it, is here presented for your consideration. Losses estimated impairs your capital in the sum of $237,460.78, the only legal means for the restoration of which is an assessment which would not only cause unfavorable comment but would leave the Bank without a surplus fund and I am sure that some voluntary means may be found for relieving the bank of these questioned assets so that an assessment may be avoided. A year ago, based upon appraisals made by the examiner who then examined your Bank, I suggested the organization of a corporation with a capital of not less than $500,000, the proceeds to be used for elimination of bad and undesirable assets. A closer inspection of your assets has convinced me that if dividends are to be resumed within the near future, which I believe it essential that you do, a minimum [373—43] of $1,000,000 should be provided at this time for elimination purposes.

With the elimination of $1,000,000 of non-bankable assets at this time, and this is the minimum elimination I am willing to consider without the previous approval of the Comptroller, you will continue to carry a very large volume of frozen assets, but these, properly handled, should be worked out with small if any loss over a period of years. Liquidation of $1,000,000 of non-producing assets should increase your earnings at least $50,000 per annum, and would, I think, justify the resumption of dividends of 5% to 6%, or around 60% of your net

earnings on operations. In my opinion it would be a serious mistake for you to put into effect any sort of a reorganization program at this time that is not entirely adequate for the removal of all possible losses and doubtful assets so that dividends may be assured and that your Bank may take its proper place among metropolitan institutions.

Respectfully,

T. E. HARRIS,

Chief National Bank Examiner, 12th Federal Reserve District."

(R., 154,158.)

Following the Harris letters the Comptroller of the Currency wrote the board of directors, December 2, 1926, as follows:

"TREASURY DEPARTMENT,

Washington.

December 2, 1926.

Board of Directors,

Northwestern National Bank,

Portland, Oregon.

Dear Sirs:

The report of an examination of the Bank by Chief Examiner T. E. Harris, completed on October 26, has been received and shows, as you will note by reference to page 11 of the report, a copy of which should be in your possession, that assets amounting to $507,968.74 have been classified as doubtful and $809,774.12 as worthless.

The amount of assets classed as doubtful has declined somewhat since the previous examination but

the amount of those classified as losses has increased many times since then. Although the aggregate of criticised assets, including those regarded as slow, has shown a declining tendency for the past several years, each report shows that assets previously regarded as slow or doubtful have, in the opinion of the examiner, developed into losses. The result, of course, is to confirm the opinion previously entertained by this office that criticized assets as a whole were of a much lower grade than was indicated by the reports and lower also than they were believed to be by the directors.

The examiner states that more than $2,000,000 of the assets are productive of no revenue, which alone [374—44] is a strong indication that that amount is of a decidedly sub-standard character. When, therefore, his estimates of doubtful and worthless assets are remembered, his position that at least a million dollars of the losses and remaining more objectionable assets should be removed, is believed well taken. This office is in doubt as to whether that amount will be sufficient but it is certainly no less than should be removed and this office will expect that action be taken to comply with the examiner's recommendations.

As soon as possible after receipt of this letter you are requested to convene at a special meeting, to give the examiner's report consideration and to promptly advise this office what program has been outlined by which the losses and the most objectionable of the doubtful assets will be removed.

The report, as you know, shows an impairment of

the capital. This office desires, however, to cooperate with the board to as great an extent as is consistent with its responsibilities and will for the moment withhold issuance of a formal impairment notice, pending receipt of advices from you regarding your plans for meeting the situation. You are requested, however, to be prompt in whatever action you propose to take.

Please forward a copy of your reply to this letter to Chief National Bank Examiner, T. E. Harris, 1103 Alexander Building, San Francisco, California.

Respectfully,
(Signed) E. W. STEARNS,
Deputy Comptroller."

(R., 161-62.) [375—45]

TESTIMONY OF M. SKINNER, FOR COMPLAINANTS.

It is the evidence of the witness SKINNER that between the 18th day of May, 1926, and throughout the year 1926, the board of directors did not consider the Examining Committee's report, and there was no report considered by any of the board of directors or was made by the Examining Committee until February 16, 1927, for the year 1926, and the evidence is that the written statement of the Examining Committee of December 7, 1926, considered February 16, 1927, as presented by the Committee, Spaulding, Metschan and Charlton was as follows:

(Testimony of M. Skinner.)

"Portland, Oregon, December 7, 1926.

To the Board of Directors The Northwestern National Bank of Portland, Portland, Oregon.

Gentlemen:

We, your Examining Committee, appointed at the annual meeting, beg leave to report that on November 19th to December 1st we made a full and careful examination of the affairs of this bank as of date.

We counted the cash, examined the bonds and all other securities; we checked the notes; collateral and real estate; checked the outstanding and certified checks, cashier's checks, the Time and Demand Certificates of Deposit and overdrafts; we verified the outstanding stock certificates; verified the first clearings; examined the Expense Account and general affairs of the Bank, making a full and careful examination of same. We found the books correct.

We recommend that the stockholders organize a corporation for the purpose of taking out of the Bank assets that we consider frozen, and which should be liquidated in an orderly manner.

When this is done, we would recommend the bank resume the paying of reasonable dividends.

(Signed) CHAS. K. SPAULDING.
PHIL METSCHAN.
A. D. CHARLTON."

(R., 137.)

And there was no other report made to the board of directors by the Examining Committee in the year 1927. [376—46]

(Testimony of M. Skinner.)

On December 11, 1926, the board of directors held a special meeting about the Harris report of September 21, 1926, Mr. Harris being present, at which time the following proceedings were had:

"At a special meeting of the Board of Directors of The Northwestern National Bank of Portland, held this date, there were present Messrs. O. L. Price, Emery Olmstead, A. D. Charlton, Phil Metschan, C. K. Spaulding, F. F. Pittock, E. S. Collins, Natt McDougall, Chas. H. Stewart and M. Skinner, Mr. Price presiding.

Mr. T. E. Harris, Chief National Bank Examiner of the Twelfth Federal Reserve District, attended the meeting and discussed with the members of the Board his recent examination of the affairs of the Bank. The various items listed for comment and criticism in the Examiner's letter of October 22nd were given special attention, and the suggestion that a company be organized for the purpose of removing from the bank certain slow and criticised assets, was approved by the Board substantially as outlined in said letter.

There being no further business to come before the meeting it then adjourned.

(Signed) O. L. Price,
Chairman."

The witness SKINNER testified that there was no other action by the Board on the December 2, 1926, letter than appeared as of the December 11th meeting.

(Testimony of M. Skinner.)

On January 11, 1927, the witness testified that Mr. Morden placed in nomination the directors, Charlton, Collins, McDougall, Chauncey McCormick, Olmstead, Pittock, Price, Skinner, Spaulding, Stewart, Twohy and Metschan, and that on January 11, 1927, the Comptroller's letter of December 2, 1926, was then read to the board and at the same time the official copy of the Examiner's report of September 1, 1926, was presented to the directors. No action was taken by the board officially upon this matter. [377—47] (R., 170.)

It then appeared from the evidence that on the 5th day of March, 1927, another examination of the Bank had been had by Chief Examiner Harris, and thereafter and on the 18th day of March 1927, the board of directors of this Bank wrote the Comptroller of the Currency at Washington, D. C., as follows:

"March 18, 1927.

Comptroller of the Currency,
Washington, D. C.,

Sir:

Following the completion of his examination of this institution as of March 5, 1927, Chief Examiner, T. E. Harris has invited our attention to the various matters herein referred to with the request that we write you concerning them:

Losses Estimated $2,446,769.65

This estimate of losses is in excess of the capital, surplus and profits by $2,859.10, and makes neces-

sary an assessment of 100%. We are unanimous in the request that you immediately issue formal notice of impairment of capital, together with the necessary instructions, that we may proceed to collect the assessment if we find that we cannot obtain unanimous consent of shareholders to voluntarily restore the capital.

Losses estimated will be charged off and an account opened 'Due from Stockholders on Account of Assessment,' which will be charged $2,000,000. In the event a report of condition is called for prior to the collection of the assessment, this item will be shown as "Other Assets" as instructed by your Examiner.

The payment of an assessment of 100% has guaranteed by certain responsible shareholders, a copy of which guarantee is submitted herewith.

This bank has been under criticism from your Department for a number of years and particularly so since the acquisition of the old Merchants National Bank's assets. It has acquired a volume sufficient to produce a splendid net profit on operations. With the elimination of nearly $2,500,000 of income producing assets its earnings should be materially improved, so that earnings of 15% or more may be confidently expected. We assure you that the credit policies of this bank henceforth will be conservative so that earnings may be used for dividend purposes and reflected in individual profits, after eliminating any losses that may [378—48] possibly develop in assets now owned,

though we believe these, if any, will be offset by recoveries.

The assessment destroys our surplus fund of $400,000. With all our past difficulties we have succeeded in maintaining the confidence of the public. It is apparent now that we are losing a few small accounts, chiefly savings accounts. This is a situation that is hard to meet. We do not want to go to the public with a published statement showing no surplus. We have no fault to find with the classification of assets made by your examiner, though we do believe that in time we will make substantial recoveries on certain items estimated as losses. We admit all items so classified are non-bankable and should be removed.

It is our desires to put all charged off assets into a corporation, all of the stock of which will be trusted for the benefit of shareholders of the bank, and have this corporation execute its note to the bank for $400,000, which amount will be put into recoveries and transferred to surplus. Your Examiner has agreed with us to recommend that we be permitted to do this, with your approval, provided the note be made to mature in two years, when it must be eliminated, and, provided further, that each of the directors will unconditionally guarantee that after applying all recoveries from the assets owned by this corporation, and after applying all undivided profits on hand on the date of the maturity of its note (keeping the $400,000 surplus fund

intact) any balance due thereon will be taken up by the directors individually.

Our only objection to this program is the fact that some of our directors are men of large affairs, who sometimes borrow for themselves or use their credit for the benefit of their respective interests, and the liability incurred as above would detract from their financial statements and hamper them in their individual efforts. We will appreciate a counter suggestion from you, as to how this problem may best be solved.

It has been brought to our attention that losses have been estimated on loans classed as excessive, and the directors have been requested to remove these losses personally. We are furthermore advised that under a law a director becomes personally liable for such losses upon a suit by any shareholder or a receiver, when the loans were approved or acquiesced in by him and under a proper showing of negligence. We do not admit any liability in this connection. While there are excessive loans in the bank there are mitigating circumstances and at least one of the loans became excessive in direct violation of a resolution of this board.

Your examiner has informed us that the only legal means for the restoration of capital in a national bank is by way of assessment,—the only means he can insist upon. He has seriously recommended, however, that we consider the organization of a new institution, which he assures us can be accomplished in a very short time, to take over the

(Testimony of M. Skinner.)

business of this bank. By this method it is pointed out that we may now provide a surplus fund,—making an announcement [379—49] to the public that should inspire confidence,—avoid the comments incident to an assessment (which must cover a period of some four months) end the advertisement and sale of stock of delinquent shareholders. We will give this suggestion full consideration, but at present we want to proceed with an assessment on the stock.

Some months ago you suggested that we consider a change in the management. A change recently occurred by the resignation of one of our active officers whom we believe to be the one referred to in your letter.

Respectfully,

M. SKINNER,	O. L. PRICE,
E. S. COLLINS,	A. D. CHARLTON,
C. K. SPAULDING,	PHIL METSCHAN,
NATT McDOUGALL,	JAMES F. TWOHY,
CHAS. H. STEWART,	F. F. PITTOCK,

Directors."

(R., 166–169.)

Upon this subject the following questions were put to the witness and the following answers were given:

Q. Now then will you look at page 437 and show me any place up to this letter of December 2, 1926, which I called your attention to, which you said you couldn't find, where there is any action by the Board

(Testimony of M. Skinner.)

concerning the subject matter first suggested to the Comptroller on March 18, 1927?

Mr. HART.—I have no doubt that may be a correct question, but it is confusing, I think, in that the letter of March 18, 1927, just read, didn't deal precisely with the same subject that was talked of in the Comptroller's letter, in that much had transpired in that interim. As your Honor knows, the flat had been discovered, and a vastly different situation was presented.

Mr. BRISTOL.—If your Honor thinks my question at all confusing, I will change it.

Q. Will you show me please where the subject matter dealt with in the letter of March 18, 1927, that I have just read—you understand that question, don't you—is dealt with by the Board in any official action since the meeting of January 11, 1927; any place; I don't care whether in the front of the book, the back, of the book, or anywhere else; just show me. A. I don't find any.

Q. Is there any, to your knowledge, being a director? A. I do not think so, officially.

Q. Now then, will you please look. Now, you held a meeting of the stockholders on January 11th, preceding that letter of March 18th, that I read, didn't you? A. Yes, sir. [380—50]

Q. Will you look at the stockholders meeting, the minutes of that meeting of January 11, 1927, and now refresh your recollection there, and see if you can point out any official action of the stockholders of that bank authorizing the directors to go to and

(Testimony of M. Skinner.)

into the subject matter and do the acts or things that are referred to in the letter of March 18, 1927. I am asking you about the stockholders action this time? A. No, sir, nothing in there.

Q. Is there any between January 11, 1927, that you know of, or can tell me about, that might by omission or oversight or any other way, not get into this book of stockholders meetings prior to the letter shown on page 437, of March 18, 1927?

A. No, sir.

Q. You are sure there wasn't any, aren't you? You are sure there were no stockholders meetings.

A. I do not recall it.

Q. You would recall it if such a thing had been held? A. It would be in here I am sure.

Q. You are secretary of the board? A. Yes.

Q. So you can say positively it was not held, can't you? A. I think I can.

Q. You won't forget to get me the copy of that guaranty? I want it to go with this letter?

A. I have a memorandum of it.

Q. Now, I want you to look and see if on the 29th day of March,—the very next action after the letter of March 18, 1927, on page 437, that I can find in the book, seems to be at page 438 and I ask if that is the next official action of the board of directors of that bank? A. Yes, sir.

Q. And it purports to show that you signed it as secretary. A. Yes, sir.

Q. It bears your signature. Now, there was no other action of the board officially recorded any-

(Testimony of M. Skinner.)

where, was there, between March 18, 1927, and March 29, 1927? A. Not as a full board.

Q. Well, was there any minutes recorded anywhere of any kind of a board?

A. I would have to look that up.

Q. How long would that take you?

A. Just a second.

Q. What is in it? Do you mean it was in this book?

A. It might be; I don't recall when we stopped using it.

Q. This seems to show nothing in there after March 22, 1927.

A. That was the point I wanted to find out.

Q. I am going into this when I come to it, so we won't have you in any place where you haven't a full opportunity to tell us all that you may know about it. A. Apparently there was not.

Q. Then we can say that the next official action of the board of this bank, these directors that we [381—51] have been talking about, after the 18th of March, page 437, is the minutes on page 438?

A. Yes, sir.

Mr. BRISTOL.—I offer in evidence the record on page 438, special meeting of the board of directors.

MINUTES OF SPECIAL MEETING OF BOARD OF DIRECTORS OF THE NORTHWESTERN NATIONAL BANK.

A special meeting of the board of directors of

the Northwestern National Bank of Portland, Oregon, was duly held at the banking house of said bank at the corner of Sixth and Morrison Streets, in the City of Portland, this 29th day of March, 1927, at 9 o'clock A. M.

The following directors were present;

O. L. Price	A. D. Charlton
E. S. Collins	M. Skinner
Phil Metschan	Charles H. Stewart
Chas. K. Spaulding	Natt McDougall

Directors Chauncey L. McCormick, F. F. Pittock and James F. Twohy were absent from the state.

President O. L. Price presided and the secretary, M. Skinner, kept the minutes of the meeting.

There was thereupon presented to the meeting a draft of contract between the Northwestern National Bank of the one part and the First National Bank of Portland and The United States National Bank of Portland, of the other part, in the form of a proposal and a proposed acceptance, providing for the sale of all assets of The Northwestern National Bank and the assumption of certain liabilities of said bank by The First National Bank and The United States National Bank.

Thereupon a resolution was offered by Mr. Phil Metschan who moved its adoption, which motion was seconded by Mr. A. D. Charlton and said resolution was unanimously adopted, and by said resolution it was unanimously

RESOLVED that the president and secretary of the Northwestern National Bank be and they are hereby authorized and directed to execute and de-

liver to The First National Bank of Portland and the United States National Bank of Portland, a written proposal in the form now submitted to the meeting, and that said form so submitted to the meeting be preserved in the record book of this bank.

Thereupon a resolution was offered by Mr. C. K. Spaulding who moved its adoption, which motion was seconded by Mr. Chas. H. Stewart, which resolution is in words and figures as follows, to wit:

WHEREAS, heretofore during the month of March 1927, various stockholders of the Northwestern National Bank of Portland, Oregon, have made advances to said bank, in the aggregate sum of one million dollars, to be held by said bank as a guarantee for the payment of various and sundry obligations owing to said bank which have heretofore been criticised as undesirable assets of said bank and

WHEREAS it is anticipated that upon the sale and disposition of such criticised assets, a substantial sum will be realized and [382—52]

WHEREAS by virtue of said advance of said stockholders, the said bank became indebted in the amount above set forth.

NOW, THEREFORE, be it resolved that the officers of said bank be and they are hereby authorized to execute and deliver to MARK SKINNER as Agent representing said stockholders who have made such advances, a non-negotiable promissory note of this bank in said sum of one million dollars, payable upon demand after all liabilities of said

(Testimony of M. Skinner.)

bank to its depositors and others than to said stockholders, shall have been paid.

Thereupon a resolution was unanimously adopted by the vote of all the directors present.

Thereupon a resolution was offered by Mr. Phil Metschan who moved its adoption, which motion was seconded by Mr. Natt McDougall, which resolution is in words and figures as follows, to-wit:

WHEREAS, C. A. Morden and O. L. Price, Trustees of the Estate of Henry L. Pittock, have paid to the Northwestern National Bank of Portland, Oregon, the sum of one million ($1,000,000) dollars. NOW THEREFORE be it resolved that the officers of said bank be and they are hereby authorized to execute and deliver to said C. A. Morden and O. L. Price as such Trustees, the non-negotiable promissory note of this bank in the sum of one million ($1,000,000) dollars, payable upon demand after all liabilities of said bank to its depositors and to others than its stockholders, shall have been paid.

Thereupon said resolution was unanimously adopted by the vote of all the directors present.

There being no further business the meeting thereupon adjourned.

M. SKINNER,
(Signed)
Secretary.

Q. That is your signature. A. Yes.

Q. Now as part of this have you got the agreement that was proposed and mentioned in here in

(Testimony of M. Skinner.)

the first resolution, or a copy of the same?

A. I have a copy.

Q. I would like to see it please. And secondly, have you the note which is made to Mark Skinner, or copy thereof, the non-negotiable note of the bank in the sum of $1,000,000.

A. I have a copy of it.

Q. I would like to see a copy of that, provided Mr. Hart does not object to the copy instead of the original instrument?

A. These are the copies of the notes, respective notes referred to. What you want now is the bank agreement. I think this is it.

Q. Now, you are sure this is the one. I call your attention—please don't misunderstand, that this is the one that is in compliance with resolution on the second sheet, that says, "In said form so submitted to the meeting be preserved in the Record Book of this Bank." In other words there is no such contract as you are talking about in the record book of this Bank, is there? [383—53]

A. Apparently not.

Q. Now, what I want to be sure about is that the contract you are producing is the very contract that was to be at that time in the book of this bank?

A. Yes, sir.

Q. Is that it? A. Yes, sir.

Q. Now, in connection with the resolution of this Board as it was intended to be in the record, I read this agreement. You say these two papers are the notes referred to? A. Yes, sir.

Mr. BRISTOL.—I offer this agreement, handed to me by the witness, under the circumstances delineated by the witness in the testimony, as part of the same proceedings page 438 of the board of directors.

"To First National Bank of Portland, Oregon, and United States National Bank of Portland Oregon.

Gentlemen:

The undersigned, The Northwestern National Bank of Portland, Oregon, hereby proposes to sell, assign and convey to you all of its assets of any name and nature in consideration of your assuming and agreeing to pay all of its liabilities, including liabilities to depositors, but excepting from said agreement to assume and pay two certain notes bearing even date herewith each non-negotiable in form; one for one million dollars ($1,000,000) payable to C. A. Morden and O. L. Price, trustees, and the other for one million ($1,000,000) payable to Mark Skinner, agent, executed by The Northwestern National Bank of Portland; and excepting any liability to any shareholders of said Northwestern National Bank of Portland. It is further understood that you will liquidate and convert into cash all of the assets so sold and transferred which may be necessary to pay those liabilities so assumed by you and the reasonable expenses of such liquidation and shall thereupon re-assign and re-convey to the undersigned all such assets then remaining.

It is especially agreed by C. A. Morden and

O. L. Price, trustees, and Mark Skinner, agent, that if said assets so sold and transferred shall be insufficient when liquidated to pay each and all of said liabilities so assumed, said notes and each of them shall be held for naught as to said First National Bank and said United States National Bank, and to evidence this agreement, C. A. Morden and O. L. Price, trustees, and Mark Skinner, agent, hereunto set their signatures as such. Your acceptance of this proposal shall vest in you the title to all such assets and shall bind you to assume and pay the liabilities above assumed but not those especially excepted as aforesaid. The Northwestern National Bank of Portland hereby guarantees to First National Bank and United States National Bank each and every asset so turned over and delivered, which guaranty shall be prior in right and prior in time to any liability by Northwestern National Bank upon said non-negotiable notes to C. A. Morden and O. L. Price, trustees, and [384—54] Mark Skinner, Agent.

This instrument is executed pursuant to the unanimous vote so authorized, of a majority of the Board of Directors of the Northwestern National Bank, as appears in the records of said Board in its minute book and by the signature of said Directors appended hereto.

Said directors further agree to forthwith call a special meeting of the stockholders of The Northwestern National Bank for the purpose of adopting a resolutions or resolutions ratifying the sale afore-

said and this agreement and the passage of any other resolutions germane thereto. Stockholders holding the number of shares of the outstanding capital stock of The Northwestern National Bank of Portland set opposite their respective names, join in the execution thereof as evidence of their approval thereof and append to their signatures the number of shares they respectively own and hold therein, and agree at said special stockholders' meeting to be called for said purpose, to vote affirmatively upon resolutions approving said sale, and this agreement and any other resolutions germane thereto.

Yours very truly,
THE NORTHWESTERN NATIONAL BANK OF PORTLAND.
By O. L. PRICE,
President.

Corporate Seal.
Attest: M. SKINNER,
Secy.

The foregoing proposal is hereby accepted:
THE UNITED STATES NATIONAL BANK OF PORTLAND.
By J. C. AINSWORTH,
President.
THE FIRST NATIONAL BANK OF PORTLAND.
By A. L. MILLS,
President.

Dated March 29, 1927."

Signatures of Stockholders.	Number of Shares.
C. A. Morden	
O. L. Price Trustees	7696
O. L. Price	290
E. S. Collins	760
M. Skinner	50
Phil Metschan	100
Natt McDougall	300
A. D. Charlton	250
Chas. H. Stewart	65
C. K. Spaulding	200
James B. Kerr	100
J. E. Wheeler	4700
Emery Olmstead	1085
Emery Olmstead, trustee	150

In consideration of the foregoing agreements on the part of the First National Bank and the United States National Bank of Portland, the undersigned directors and stockholders of Northwestern National Bank of Portland jointly and severally guarantee to said First National Bank of Portland and said the United States National Bank of Portland each and all of said assets transferred as hereinbefore set forth to the maximum extent of two million dollars ($2,000,000) in addition to all other [385—55] agreements hereinbefore contained, payable as called for at any time after twelve (12) months from date. Any asset which First National Bank and United States National Bank deem wise to compromise, sell or dispose of for less than its face value, or in case of real estate to sell for less than its present

(Testimony of M. Skinner.)

book value, shall first be offered to said guarantors at said proposed sale price and said guarantors shall have five (5) days after said notice, to themselves purchase the same at said price and failure to so purchase within said time shall be deemed an approval by said guarantors of said sale at said price. No such sale shall be deemed to diminish said guarantee in amount as to any assets remaining unliquidated nor shall this guarantee be otherwise diminished than by the full repayment from said assets, the stockholders statutory double liability and this guarantee, of all monies expended hereunder by said First National Bank and United States National Bank. Notices required hereunder shall be sufficient if sent to O. L. Price one of said guarantors at his office in Portland, Oregon, by United States mail. This guarantee is attached to and a part of contract of even date herewith between the Norhwestern National Bank of Portland and the First National Bank of Portland and the United States National Bank of Portland.

Dated March 29, 1927.

NATT McDOUGALL.

C. A. Morden.)
O. L. Price.) Trustees

O. L. Price.	A. D. Charlton.
E. S. Collins.	Chas. H. Stewart.
M. Skinner.	C. K. Spaulding.

Phil Metschan."

NATT McDOUGALL.

"Q. I take it that those were the original signa-

(Testimony of M. Skinner.)

tures on there that you saw put on? A. Yes, sir.

Q. Now, I ask you for the two notes, and in pursuance of the second page of the resolution on page 438, this is the note, is it, that was made to Mark Skinner, Agent?

A. This is a copy, yes. This is a correct copy.

Q. Now can you tell me whether that note bore the seal of the Northwestern National Bank?

A. The copy indicates that it did. I presume that it did.

Q. Your copy indicates here that it did?

A. Yes.

Q. Did you make that copy?

A. No, Mr. Kerr's office made that for me.

Q. And that being the first one referred to, it is offered in evidence.

Portland, Oregon, March 29, 1927.

For value received the Northwestern National Bank of Portland, Oregon, promises to pay to the order of Mark Skinner, Agent, the sum of one million dollars ($1,000,000) with interest at the rate of six per cent per annum from the date hereof, payable on demand, when and only when from the proceeds of the liquidation of the assets of said payer this date transferred to the First National Bank [386—56] of Portland and the United States National Bank of Portland, all pursuant to contemporaneous guaranty of the payers, said last named banks have realized sufficient to fully liquidate the liabilities of the payer assumed under

(Testimony of M. Skinner.)

contract of even date with the payer. In case suit or action is instituted to collect this note or any part thereof, the said corporation promises to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action. In witness whereof the said corporation under authority of resolution of its Board of Directors has caused this note to be executed by its duly authorized agents.

THE NORTHWESTERN NATIONAL BANK OF PORTLAND.

By O. L. PRICE,
President.

Q. Attest who?

A. It is not given there.

Q. Well did you attest it, or who did?

A. I don't recall that.

Q. Who put the seal on?

A. I don't know why it should not show there.

Q. It doesn't, that is why I ask you.

A. Those facts can be ascertained.

Q. Well, who from? A. From the original.

Q. Well, Mr. Skinner, here is what I am after. I think you understand it. Here is the resolution of the Board which says that this particular note, the one I am talking about in the resolution which is a part of these minutes, should be executed to you. Now it doesn't say in the resolution—I am not arguing with you, I am just explaining—who was to execute it. Over here, in the same manner, the other note you see is described as to O. L. Price and C. A.

(Testimony of M. Skinner.)

Morden, or the Pittock Estate, but it does not say anything about who is to execute it. Now it is the Bank who is to give the note, isn't it?

A. Certainly.

Q. Who were the bank officers and signed the papers at that time? You were secretary of what, of the Bank? A. Of the board.

Q. You were secretary of the board. Who was secretary of the Bank?

A. There was no such officer.

Q. Well, who signed those shares of stock in 1927? Let's get that book and find out.

A. The book of shares is not there.

Q. What?

A. The book of shares you said you did not want.

Q. No, but I want to refresh your recollection.

A. If I remember, would be signed by the cashier of the Bank?

Q. F. O. Bates?

A. At that time he was cashier, yes.

Q. Did you say he signed that note? A. No.

Mr. HART.—What is the trouble? Let's get the original, if any question about how they were signed or executed.

Mr. BRISTOL.—Well, Mr. Hart there is no trouble. I want to know who signed it. [387—57]

COURT.—Have you the originals?

Mr. HART.—The originals are in safekeeping in the safety deposit. They can be produced.

(Testimony of M. Skinner.)

Mr. BRISTOL.—Doesn't the witness know who signed it?

Mr. HART.—I don't know what his recollection may be.

Mr. BRISTOL.—Do you know who signed it?

Mr. HART.—I do not.

Mr. BRISTOL.—I insist upon knowing who signed it and put the seal on it.

A. I might state I will be glad to get that information." (R., 170–1)

Q. Now this is a note you handed me that you say is one made at the same time to C. A. Morden and O. L. Price, trustees? A. Yes, sir.

Q. In conformity with those resolutions on page 438. A. Yes, sir.

Portland, Oregon, March 29, 1927.

FOR VALUE RECEIVED the Northwestern National Bank of Portland, Oregon, promises to pay C. A. Morden and O. L. Price, Trustees, the sum of one million dollars ($1,000,000) with interest at the rate of six per cent per annum from the date herein, payable on demand when and only when from the proceeds of the liquidation of the assets of said payer this day transferred to the First National Bank of Portland and the United States National Bank of Portland, all pursuant to the contemporaneous guaranty of the payer, said last named banks have realized sufficient to fully liquidate the liabilities of the payer assumed under contract of even date with the payer. In case suit

(Testimony of M. Skinner.)

or action is instituted to collect this note or any part thereof the said corporation promises to pay such additional sum as the Court may adjudge reasonable as attorneys' fees in said suit or action. In Witness Whereof the said corporation under authority of resolution of its Board of Directors has caused this note to be executed by its duly authorized officers.

THE NORTHWESTERN NATIONAL BANK OF PORTLAND.

By O. L. PRICE,
President.

Q. Attested by whom? You give the same answer as the other? A. Yes." (R., 186–187.)

The next step, as shown by the evidence, of the board of directors was their special meeting April 6, 1927, wherein Price, Stewart, Collins, Spaulding, Metschan and Skinner authorized Stewart to dispose of certain bonds held by the Treasury of the United States as security for certain bank funds and enabling Charles H. Stewart to sell and dispose of the same, the aggregate of said bonds being as set [388—58] forth in the resolution $343,500.00; and thereupon at another special meeting of the board of directors on April 15, 1927, at which were present Price, Spaulding, Collins, Stewart, Pittock, Charlton and Skinner the president reported to the board in detail the status of the bank's affairs, and the directors discussed plans for the liquidation of the bank's business.

The witness SKINNER then testified that there

were no other records of meetings of either the executive committee or of the board.

It then appeared from the evidence that there was a special meeting of stockholders held on the 3d day of May, 1927, at which there were 16,955 shares, computed as follows:

L. Price and		
A. Morden, Trustees in person	7696	shares
S. Collins in person	760	"
L. Price in person	290	"
F. Pittock in person	175	"
F. Emery in person	100	"
mes B. Kerr in person	250	"
D. Charlton in person	50	"
Skinner in person	10	"
tthew Harris in person	65	"
ce W. Nelson by Palmer L. Fales, proxy	5	"
tt McDougall by Palmer L. Fales, proxy	300	"
D. McDougall by Palmer L. Fales, proxy	100	"
W. Wheeler by Palmer L. Fales, proxy	4700	"
il Metschan by Palmer L. Fales, proxy	100	"
gar B. Piper by Palmer L. Fales, proxy	50	"
ng On by Palmer L. Fales, proxy	25	"
D. Johnson by Palmer L. Fales, proxy	100	"
ncis P. Graves & Co. by Palmer L. Fales, proxy	200	"
G. McFee by Palmer L. Fales, proxy	16	"
s. G. Treat by Palmer L. Fales, proxy	120	"
kerman Williams by Palmer L. Fales, proxy	20	"
nie C. Cotton By James G. Wilson, proxy	30	"
ce E. Griffith by John F. Reilly, proxy	10	"
te P. Hebard By Lockwood Hebard, proxy	100	"
an P. Emery By E. Fred Emery, proxy	148	"

R. A. Long By S. M. Morris, proxy..... 100
Emery Olmstead by Chas. E. McCulloch, proxy.... 1185
Emery Olmstead, trustee, by Chas. E. McCulloch proxy 150

Total shares present in person and by proxy.....16955 Sh

[389—59]

Proof of notice of the meeting as mailed was sent out and this notice was dated the 31st day of March, 1927, and was as follows:

"March 31st, 1927.

Dear Sir:

In accordance with the by-laws of the Northwestern National Bank of Portland (Oregon), you are hereby notified that a special meeting of the shareholders of the Northwestern National Bank of Portland will be held on Tuesday, May 3rd, 1927, at the hour of 10:30 o'clock in the forenoon, at the banking rooms of said bank on Morrison Street, between Sixth Street and Broadway, in the City of Portland, Oregon, for the following purposes:

1. To vote upon a resolution in the form prescribed by the Comptroller of the Currency to place this bank in voluntary liquidation under sections 5220 and 5221, United States Revised Statutes, to take effect at once.

2. To appoint, under said resolution, O. L. Price, now president of this bank, as liquidating agent;

3. To vote upon a further resolution ratifying, approving and confirming the action of the board

of directors, at its special meeting held March 29, 1927, in voting to sell all of its assets to the First National Bank of Portland (Oregon) and the United States National Bank of Portland (Oregon), and authorizing its president and secretary to enter into a contract with said First National Bank of Portland and said The United States National Bank of Portland in the form of a written proposal, accepted in writing by said First National Bank of Portland and said The United States National Bank of Portland, under and by virtue of which said board of directors caused said assets of this bank to be delivered to said First National Bank of Portland and said The United States National Bank of Portland, guaranteed by this bank, and the said First National Bank of Portland and said The United States National Bank of Portland agreed to liquidate and convert the same into cash, and to pay all of the liabilities of this bank including liabilities to depositors, but not including the liability of this bank for $2,000,000 advanced by certain of its shareholders, and not including any liability to shareholders of this bank; and to thereby prevent the closing of this bank with great resulting loss and injury to depositors, as a consequence of the disastrous run in progress at the time of the adoption of said directors' resolution, which contract was contemporaneously approved in writing by shareholders of this bank owning and holding more that two thirds of its capital stock.

4. To adopt such further and additional resolu-

tions, if necessary, in any respect germane to any of the foregoing.

You are further advised that said action of the board of directors and officers of this Bank, [390—60] hereinbefore set forth, was done upon the advice, and with the approval of United States Banking Examiner William C. Crawley, and Chief National Bank Examiner T. E. Harris.

Enclosed herein is a written proxy, which kindly execute and return in the enclosed stamped envelope, at your early convenience.

Yours very truly,

NORTHWESTERN NATIONAL BANK OF PORTLAND.

By FRANK C. BATES,

Cashier.

NORTHWESTERN NATIONAL BANK OF PORTLAND.

By M. SKINNER,

Secretary."

Thereupon on the motion of Fales, proxy for the above mentioned stock, seconded by Jas. B. Kerr, the following resolutions were adopted and proceedings had:

"Resolved, That The Northwestern National Bank of Portland be placed in voluntary liquidation under the provisions of Sections 5220 and 5221 of the United States Revised Statutes, to take effect at once, and that O. L. Price, now president of said bank, be appointed liquidating agent or liquidation committee of said bank; that liquidation shall be conducted in accordance with law and under the

supervision of the board of directors, who shall require a suitable bond to be given by the said agent or committee in an amount to be fixed by the board of directors; that the said liquidating agent or committee shall render semi-annual reports to the Comptroller of the Currency on the 1st of April and October of each year showing the progress of said liquidation until said liquidation is completed; that said liquidating agent or committee shall render an annual report to the shareholders on the date fixed in the articles of association for said annual meeting, at which meeting the shareholders may, if they see fit, by a vote representing a majority of the entire stock of the bank, remove the liquidating agent or committee and appoint another in place thereof; that a special meeting of the shareholders may be called at any time in the manner as if the Bank continued an active bank, and at said meeting the shareholders may, by a vote of a majority of the stock, remove the liquidating agent or committee; that the Comptroller of the Currency is authorized to have an examination made at any time into the affairs of the liquidating bank until the claims of all creditors have been satisfied, and that the National Bank Examiner will be compensated [391—61] for his time and expense in making the examination in question.

The foregoing resolution was adopted by 16,915 votes, representing more than two-thirds of the capital stock of the association, no director, other officer, or employees having acted as proxy, with

shareholder Cotton, holding 30 shares, and shareholder Griffith holding 10 shares, voting 'no.'

Thereupon, proxy shareholder Fales moved, shareholder James B. Kerr seconded, and the following resolution was adopted:

Be it Resolved, that whereas, at a special meeting of the board of directors of the Northwestern National Bank of Portland held at the banking house on the 29th day of March, 1927, the following resolution was unanimously adopted:

'There was thereupon presented to the meeting a draft of contract between the Northwestern National Bank of the one part and The First National Bank of Portland and The United States National Bank of Portland, of the other part, in the form of a proposal and a proposed acceptance, providing for the sale of all assets of The Northwestern National Bank and the assumption of certain liabilities of said bank by The First National Bank and The United States National Bank.

Thereupon a resolution was offered by Mr. Phil Metschan who moved its adoption, which motion was seconded by Mr. A. D. Charlton and said resolution was unanimously adopted, and by said resolution it was unanimously

Resolved that the president and secretary of the Northwestern National Bank be and they are hereby authorized and directed to execute and deliver to The First National Bank of Portland a written proposal in the form now submitted to the meeting, and that said form so submitted to the meeting be

preserved in the record book of this bank '—
and

Whereas, the contract in the form of a proposal and acceptance, as in said resolution referred to, was thereupon, in pursuance of the authority of said resolution of said board of directors, constituting more than a quorum thereof, duly executed, with the written approval thereon of the nine directors present at said meeting, and with the written approval thereon of shareholders holding 15,746 shares, and more than two thirds of the authorized and outstanding capital stock of this bank, and with the guaranty of directors and shareholders C. A. Morden and O. L. Price, Trustees, O. L. Price, E. S. Collins, M. Skinner, Phil Metschan, Natt McDougall, A. D. Charlton, Chas. H. Stewart and C. K. Spaulding, all as follows: [392—62]

To First National Bank of Portland, Oregon, and United States National Bank of Portland, Oregon.

Gentlemen:

The undersigned, The Northwestern National Bank of Portland, Oregon, hereby proposes to sell, assign and convey to you all of its assets of any name and nature in consideration of your assuming and agreeing to pay all of its liabilities, including liabilities to depositors, but excepting from said agreement to assume and pay, two certain notes bearing even date herewith, each non-negotiable in form, one for One Million Dollars ($1,000,000) payable to C. A. Morden and O. L. Price, Trustees,

and the other for one million dollars ($1,000,000) payable to Mark Skinner, Agent executed by The Northwestern National Bank of Portland; and excepting any liability to any shareholders of said Northwestern National Bank of Portland.

It is further understood that you will liquidate and convert into cash, all of the assets so sold and transferred which may be necessary to pay those liabilities so assumed by you and the reasonable expenses of such liquidation and shall thereupon re-assign and re-convey to the undersigned all such assets then remaining.

It is especially agreed by C. A. Morden and O. L. Price, trustees, and Mark Skinner, agent, that if said assets so sold and transferred shall be insufficient when liquidated to pay each and all of said liabilities so assumed, said notes and each of them shall be held for naught as to said First National Bank and said United States National Bank, and to evidence this agreement, C. A. Morden and O. L. Price, Trustees, and Mark Skinner, Agent, hereunto set their signatures as such.

Your acceptance of this proposal shall vest in you the title to all such assets and shall bind you to assume and pay the liabilities above assumed but not those especially excepted as aforesaid. The Northwestern National Bank of Portland hereby guarantees to First National Bank and United States National Bank each and every asset so turned over and delivered, which guaranty shall be prior in right and prior in time to any liability by Northwestern National Bank upon said non-

negotiable notes to C. A. Morden and O. L. Price, trustees, and Mark Skinner, agent.

This instrument is executed pursuant to the unanimous vote so authorized, of a majority of the board of directors of The Northwestern National Bank, as appears in the records of said Board in its minute book and by the signatures of said Directors appended thereto.

Said directors further agree to forthwith call a special meeting of the stockholders of The Northwestern National Bank, as appears in the records of said Board in its minute book and by the signatures of said directors appended thereto.

Said directors further agree to forthwith call a special meeting of the stockholders of the Northwestern National Bank for the purpose of adopting a resolution or resolutions ratifying the sale aforesaid and this agreement and the passage of any other resolutions germane thereto. Stockholders holding [393—63] the number of shares of the outstanding capital stock of The Northwestern National Bank of Portland set opposite their respective names, join in the execution hereof as evidence of their approval thereof and append to their signatures the number of shares they respectively own and hold therein, and agree at said special stockholders' meeting to be called for said purpose, to vote affirmatively upon resolutions approving said

sale, and this agreement and any other resolutions germane thereto.

Yours very truly,
THE NORTHWESTERN NATIONAL BANK OF PORTLAND.
By O. L. PRICE,
President.

(Corporate Seal)
Attest:
M. SKINNER, Secy.

The foregoing proposal is hereby accepted:
THE UNITED STATES NATIONAL BANK OF PORTLAND.
By J. C. AINSWORTH,
President.
THE FIRST NATIONAL BANK OF PORTLAND.
By A. L. MILLS,
President.

Dated March 29, 1927."
(R.200–204.)

It then appeared from the evidence that on the 31st day of March, 1927, the directors and guarantors had executed an instrument with the First National Bank of Portland and the United States National Bank of Portland providing that none of the assets of the Northwestern National Bank of Portland taken over by these banks should be compromised, sold or disposed of except on face value except on the notice therein prescribed, and that stocks and bonds comprising the assets should be sold at their market value except upon notice, and

in respect of this document the directors and guarantors then acting, Morden, Price, Collins, Skinner, Charlton, Metschan, Stewart, Spaulding and McDougall addressed to the First National Bank of Portland, Oregon, and the United States National Bank of Portland, Oregon, two communications or papers, [394—64] part of the same transaction under dates of April 5th and 12th, 1927, as follows, to wit:

Portland, Oregon, April 5, 1927.

First National Bank of Portland, and The United States National Bank of Portland.

Gentlemen:

The undersigned heretofore executed and delivered to you a certain guaranty dated March 29, 1927, guaranteeing the assets of the Northwestern National Bank of Portland, thereby warranting their legal assistance, that the same were worth their face and accrued interest, if any, and in the case of real estate worth its book value; for the purpose of assuring you of full reimbursement of all advances made or to be made by you in the payment of the obligations of the Northwestern National Bank of Portland assumed by you in the agreement referred to in said guaranty, which guaranty is in the maximum amount of $2,000,000;

In view of the fact that some difficulty is being encountered in liquidating the assets because of the strict requirements of the law in regard to the rights of guarantors, which are in this instance working to the prejudice of the undersigned, we

deem it advisable to and do hereby authorize you to surrender any collateral heretofore held by the Northwestern National Bank of Portland as security for any obligation to it owing, upon the payment of the amount of the written obligation of the obligor for which such collateral is specifically held; and notwithstanding the general collateral provisions of said obligation; also to sell any stocks or bonds forming a part of the assets of said bank for the market value at the time of such sale, without any notice to us, but subject to the approval of O. L. Price, or his nominee, and do hereby waive protest, demand and notice of non-payment of any notes, trade acceptances or other evidence of indebtedness forming a part of the assets of said bank. It is understood, of course, that all of the assets of said Northwestern National Bank of Portland were transferred and delivered to you as collateral to secure the repayment of such advancements together with interest thereon at the rate of six per cent (6%) per annum from the time such advancements were made until they are repaid; and also the expenses incident to the liquidation of such assets; that in the event any surplus remains upon the liquidation of said assets after full repayment to you of the amounts hereinabove mentioned, it is to be turned over and delivered to the Northwestern National Bank of Portland; and in the event you have not been fully repaid your said advancements, with interest as aforesaid, and said expenses, by twelve (12) months from March 29, 1927, you have recourse against the undersigned guarantors,

jointly and severally to the extent of $2,000,000; reserving to yourselves in addition recourse against [395—65] the assets of the Northwestern National Bank of Portland then remaining unliquidated, against the bank itself, and also against its shareholders upon their statutory double liability.

You are further advised that in the event it should in your discretion become advisable to advance any funds in order to protect and conserve the assets so turned over to you, especially in order to enable certain sheep companies, now debtors of said Northwestern National Bank of Portland, to complete their operations, and to enable certain ranch owners to complete the harvest of their crops, in order to enable them to derive sufficient funds with which to pay their indebtedness to said bank, you are hereby authorized to advance such additional sum as may be authorized by O. L. Price, one of the undersigned guarantors, or his nominee, for which purpose, and such advancements, together with interest thereon from the time of the making thereof until repayment, shall constitute additional advancements on the same basis as those made for the payment of the present liabilities of said bank.

We do further advise you that the five day notice in said guaranty required to be given may be waived by Mr. O. L. Price, one of the undersigned guarantoes, or his nominee appointed in writing, on behalf of all of the undersigned; that in the event you should inadvertently or otherwise fail to give any notice to which we may be entitled, or fail to comply with

any express or implied condition of said guaranty, that we shall be discharged only to the extent of the loss actually suffered by reason of such violation; and that you shall not be in any manner liable for the shrinkage of any assets or any loss incurred in the liquidation thereof, or for any error of judgment in such liquidation, except for your own negligence.

Very truly yours,
E. S. COLLINS,
C. K. SPAULDING,

C. A. MORDEN,
O. L. PRICE (Trustees),
As Trustees under the
Last Will and Testament
of H. L. Pittock, Dec'd.

O. L. PRICE. M. SKINNER.
PHIL METSCHAN. CHAS. H. STEWART.
NATT McDOUGALL. A. D. CHARLTON."
(R., 206–209.)

"April 12, 1927.

First National Bank of Portland, Oregon, United States National Bank of Portland, Oregon.
Mr. Mark Skinner,
Portland, Oregon.

Gentlemen:

Heretofore, under date of April 5, 1927, C. A. Morden and O. L. Price, Trustees under the last Will and testament of H. L. Pittock, deceased, and others, who, under date of March 29, 1927, executed and delivered a certain guaranty agreement with

respect to the assets of the Northwestern National Bank of Portland agreed on a method of submitting to the approval of O. L. Price, or his nominee, certain [396—66] matters relating to the liquidation of the assets of said Northwestern National Bank of Portland. In order that there may be a record of the appointment by the undersigned of his nominee to act for him, in pursuance of said document dated April 5, 1927, the undersigned, O. L. Price, does hereby appoint Mark Skinner, of Portland, Oregon, as his 'nominee' and empowers said Skinner to act for *gim* in the performance of all duties, matters and things, which, under said document of April 5, 1927, the undersigned or his nominee is authorized to act.

Yours truly,

O. L. PRICE."

(R., 209, 210.)

And at said meeting of May 3, 1927, the following resolutions with respect to said matters were adopted as in said record stated, as follows, to wit:

"Resolved, that the shareholders hereby ratify, confirm and approve the action of the board of directors, at its said meeting held March 29, 1927, in voting to sell all of its assets to the First National Bank of Portland (Oregon) and The United States National Bank of Portland (Oregon), and in author izing its president and secretary to enter into the foregoing contract with said The First National Bank and said The United States National Bank of Portland, in the form of said written proposal, accepted, in writing, by said The First National

Bank of Portland and said The United States National Bank of Portland, and in causing all of the assets of this bank to be delivered to said The First National Bank of Portland and said The United States National Bank of Portland, and further approve the execution of said guaranty of March 29, 1927, by said guarantors, said instrument of March 31, 1927, said instrument of April 5, 1927, and said nomination by said O. L. Price of Mark Skinner as his 'nominee' by said instrument of April 12, 1927; Be it Further Resolved that the action of the said board of directors and the said officers in said contract of March 29, 1927, in guaranteeing the assets of said Northwestern National Bank of Portland, meaning thereby to warrant their legal existence, that the same were worth their face value and accrued interest, if any, and in the case of real estate, worth its book value, and the action of the board of directors in maintaining, undisturbed and unimpaired, shareholders' statutory double liability as to all liabilities of this bank unliquidated from said assets, are such and all hereby in all respects ratified, confirmed and approved;

Be it Further Resolved, that the shareholders of this bank recognize that the moneys advanced [397—67] by said The First National Bank of Portland and said The United States National Bank of Portland in the paying of the Liabilities of this bank, as in said contract set forth, are prior in time and prior in right in their repayment from the assets of this bank, from said guaranty and

from the shareholders' statutory double liability, to the payment by this bank to C. A. Morden and O. L. Price, Trustees, of the sum of $1,000,000 and to M. Skinner, Agent, of the sum of $1,000,000 which $2,000,000 represents money advanced by certain of the shareholders of this bank, and is represented by non-negotiable promissory notes, executed by this bank to the said C. A. Morden and O. L. Price, Trustees, and said M. Skinner, Agent, respectively:

Be it Further Resolved, that the board of directors be, and they hereby are, authorized and empowered to pass, from time to time, such further and additional resolutions as may be necessary to carry into full force and effect the said contract between this bank, said The First National Bank of Portland and said The United States National Bank of Portland, and, pursuant thereto, to authorize the officers of this bank to enter into such instruments, in writing, as may be necessary in the premises. The foregoing resolution was adopted by 16,915 votes, representing more than two-thirds of the capital stock of this association, no director, other officer or employee having acted as proxy, with shareholder Cotton, holding 30 shares, and shareholder Griffith, holding 10 shares, voting 'no.'

Thereupon, proxy shareholder Palmer L. Fales moved, shareholder James B. Kerr, seconded, and it was

Resolved that a meeting of the board of directors of this corporation be held upon the adjournment of this shareholders' meeting, and that the board

of directors be instructed to adopt a resolution directing the president of this bank, or any vice-president, or the cashier, or the secretary of the board of directors, to certify to the Comptroller of the Currency the action of this shareholders' meeting in voting to go into liquidation, and to publish notice thereof for the period of two months in a newspaper, published in the City of New York, and also in a newspaper published in the City of Portland, Oregon, which notice, so published, shall apprize the holders of the notes of this corporation, and its other creditors, that this association is closing up its affairs, and that they should present their notes and other claims against the association for payment.

The foregoing resolution was adopted by 16,915 votes, representing more than two-thirds of the capital stock of this association, no director, other officer or employee having acted as proxy, with shareholder Cotton, holding 30 shares, and shareholder Griffith, holding 10 shares, voting 'no.'

(Signed) M. SKINNER,
Secretary.

(Signed) A. L. FRALEY,
Cashier."

(R., 210–212.) [398—68]

The notes to Morden and Price, trustees, in the sum of $1,000,000 and to Skinner in the sum of $1,000,000 referred to in the foregoing resolution as aggregating the $2,000,000 were then produced in open court and identified as so made in the resolutions set forth.

It was then proved in evidence by the witness SKINNER that according to the minutes the October 14, 1924, report of the Examining Committee hereinbefore set forth did not come before the Board of Directors until December 17, 1924.

On March 1, 1927, the resignation of Emery Olmstead as president and as a director of the Bank was received to take immediate effect and accepted by the Board, and O. L. Price was then nominated for that office and continued to serve until the Bank closed.

The stockholders' meeting of January 11, 1927, at which upon call came up for consideration the entire proceedings of the Board of Directors referred to in the meeting of May 3, 1927, and as taken of the previous meetings in March and April and upon the matters involved herein the evidence shows as follows:

"Thereupon the secretary *pro tem* read in full the minutes of the special meeting of the shareholders held May 3, 1927, and on motion of proxy shareholder, George Black, Jr., seconded by shareholder E. S. Collins, said minutes were approved without any dissenting vote, except that proxy shareholder W. C. Bristol asked that the 250 shares of stock of C. A. Burckhardt for which he is proxy, be recorded as voting 'no,' and that the stock standing in the name of Francis P. Graves & Company, 200 shares, represented by W. C. Bristol, proxy, claimed by Mr. Bristol to be owned by Fred A. Ballin, be likewise recorded as voting 'no,' and both of said requests are hereby set down

as being made." (R., 246–247.) [399—69]

The evidence showed that on March 8, 1928, the president reported to the board that the officers of the Davin Michellvi Sheep & Land Company had executed a lease to the Enterprise Livestock Company for a period of three years from March 1, 1928, subject to sale on a rental basis of 15¢ per acre per annum, and the action of the officers in executing this lease was aproved upon motion of Mr. Collins, seconded by Mr. Metschan. (R., 248.)

The evidence then further showed through the testimony of the witness SKINNER that the salaries hereinbefore referred to especially had as to himself and other officers received the first increases January 19, 1924, and remained the same as to the other officers than Olmstead up to January 12, 1927, but in the meantime Kanzler was taken on at a salary of $6,000 a year in 1926 and served until the Bank closed.

It appeared from the evidence that September 11, 1923, the board of directors notified the Comptroller of the Currency that the J. E. Wheeler overdraft for $3,699.40 and The Telegram Publishing Company $24,901.94 overdraft and Brown and Wheeler endorsed L. R. Wheeler for $5,000.00 has been paid, and thereafter sundry and different transactions as shown by the evidence were had, and on the 9th day of October, 1924, at a special meeting of the Executive Committee attended by Price, Spaulding, Metschan, Pittock, Skinner with Price presiding the following motion was passed, and transactions were had and done: [400—70]

"On motion of Mr. Spaulding seconded by Mr. Metschan, the following resolution was adopted:

WHEREAS the action of officers of the bank in approving checks on other banks drawn by J. E. Wheeler against insufficient funds, has created an overdraft on his account in the amount of approximately $350,000, which amount he is unable at this time to cover in any other way;

BE IT RESOLVED that the officers of the bank be instructed to accept for discount and credit to his account the following notes:

Wheeler Timber Company 50,000
McCormick Lbr. Co. 100,000
Portland Telegram 100,000
J. E. Wheeler 100,000

It is understood that Mr. Spaulding, Mr. Metschan, Mr. Charlton and Mr. Pittock, members of the Executive Committee, were entirely without knowledge of the overdrafts mentioned above, and are approving of these loans only for the purpose of covering an existing debt.

On motion of Mr. Meschan, seconded by Mr. Charlton, the officers of the bank were especially instructed not to permit any further overdrafts on the accounts of J. E. Wheeler, or the Portland Telegram.

(Testimony of M. Skinner.)

No other business appearing the meeting adjourned.

O. L. PRICE,
Chairman.

A. D. CHARLTON.
PHIL METSCHAN.
CHAS. K. SPAULDING.
F. F. PITTOCK.

M. SKINNER,
Secretary.

(R., 264–265.)

Thereupon the Executive Committee minutes of August 18, 1925, were shown the witness Skinner and he identified the minutes and his signature thereto, whereupon the following proceedings took place:

"Q. Same people present August 18, 1925. You point out to me—Mr. Olmstead appears to have siged that. Is that his signature?

COURT.—You might assume, until something to the contrary appears.

Mr. BRISTOL.—'On motion of Mr. Spaulding, seconded by Mr. Charlton, a loan of $150,000 for a period of ninety days was granted to J. E. Wheeler, to be secured by deed to his one-eighth interest in what is known as the Trask Timber Tract, and certificates representing eighty-eight shares of the capital stock of the Silver Fork Lumber Company? [401—71]

"Mr. HAMPSON.—I would like the record to show that Mr. Metschan was not present at that

(Testimony of M. Skinner.)

meeting of the Executive Committee, and also he was not present at the meeting of the board of directors at which the minutes of that Executive Committee meeting were approved.

Mr. BRISTOL.—It is a certainty he was not at that meeting, and if you say he was not at the other, then I will stipulate to that.

Mr. HAMPSON.—All right.

Q. Do you recall the directors' meeting in the other book, of August 18, 1925, when this report came up to them?

A. No, sir, I don't remember. I am sure it was approved, though, at a later date.

Q. You are sure it was approved at a later date?

A. Yes.

Q. Do you know whether Mr. Metschan was present at that later date?

A. I couldn't say without looking it up.

Q. Will you look it up, who all were present, and answer this afternoon? A. Yes.

Q. I don't want to question Mr. Hampson, but whatever it is.

A. The book is right there.

Mr. HAMPSON.—Here it is, page 405 of the minute-book is a record of the meeting of the board of directors, where the Executive Committee report of August 18th, the one just described, was approved, and the minutes show that Mr. Metschan was not present at that meeting of the board of directors.

Mr. BRISTOL.—Well, I will stipulate that." (R., 270–271.)

It then appeared from the evidence that on April 13, 1926, there was an Executive Committee meeting at which Olmstead, Charlton, Metschan, Spaulding and Pittock were present, at which were recited the loans taken by the Bank and the amount of renewals and reductions and these loans were approved but with this limitation,—loans approved by the Committee with the exception that directors Charlton, Metschan and Spaulding withheld approval of accepted drafts drawn by J. E. Wheeler.

It then appeared in evidence that upon May 25, 1926, an Executive Committee meeting was held at which Charlton, Spaulding, Pittock and Skinner [402—72] with others were present, but not Mr. Metschan, the day after the writing of the letter of May 24, 1926, hereinbefore set forth to the Comptroller; at this meeting some thirty-three specific loans and credits by name were considered, specifically enumerated, and the officers were authorized to make advances if required in amounts which shall not exceed in the aggregate the amounts set opposite the names as follows and then were set forth the names, and among them was the Baldwin Sheep Company, Madras, $125,000.

It then appeared in evidence that on June 8, 1926, improvement of the interior of the Bank premises was considered by contract with A. Guthrie & Company in the amount of some $165,000 and the work commenced within reasonable time

and went over into the following year, 1927. (R., 278.)

Then follows that on July 13, 1926, on motion of Olmstead, seconded by Charlton, at an Executive Committee meeting the specific item of McCormick Lumber Company in the sum of $100,000 in the line of credit was revoked, and those who sat upon that meeting in addition to the two mentioned were Metschan, Price, Spaulding, Pittock and Skinner.

Thereupon the witness produced an agreement of guaranty that was referred to in the previous transactions as, of and about March 18th as stated by the witness; the agreement itself being produced by the witness and is as follows:

"THIS AGREEMENT made and entered into on March, 1927, by and between The Northwestern National Bank, of Portland, Oregon, hereinafter referred to as 'first party' and the undersigned [403—73] who are shareholders and/or directors of said bank, hereinafter referred to as 'second party.'

WITNESSETH: That whereas first party has sustained certain losses reported by the Chief National Bank Examiner in an amount in excess of the amount of the present capital stock, surplus and undivided profits, making necessary an assessment on the stock of said first party owned by the respective shareholders thereof, and WHEREAS, the first party, being in an insolvent condition, cannot be permitted to continue to operate until its solvency has been in some manner restored, the first party and second party hereby enter into the following mutual agreement:

1. Cash has been deposited in first party by shareholders signatory hereto as follows:

	Shares Owned.	Amount of Deposit.
F. F. Pittock	175	17,500
Phil Metschan	100	10,000
E. S. Collins	760	76,000
O. L. Price	290	29,000
Estate of H. L. Pittock	7696	769,000
C. K. Spaulding	200	20,000
A. L. Charlton	250	25,000
Kate Hebard	100	10,000
TOTAL CASH DEPOSITED		$957,100

2. Deposits of cash are to be made in first party within thirty days from this date by the following:

M. Skinner	50	5,000
Chas. H. Stewart	65	6,500

3. In addition to the amounts indicated in paragraphs (1) and (2) above, the payment of the amounts named by the persons named in this paragraph (3) will be paid to first party on demand:

Estate of H. L. Pittock	769,600
O. L. Price	36,500
F. F. Pittock	17,500
C. K. Spaulding	5,000
James F. Twohy	10,000
Phil Metschan	10,000
M. Skinner	1,000
Natt McDougall	1,000

E. S. Collins	76,000
Chas. H. Stewart	1,000
TOTAL	$927,600

4. The condition under which deposits referred to in paragraph (1) hereof is that the funds deposited must be used for the payment of an assessment upon the stock of the respective depositors and said deposit cannot be withdrawn for any other purpose until such assessment has been paid in the amount ordered by the Comptroller of the Currency, and the deposits to be made under paragraph (2) hereof shall be subject to the same condition.

5. Deposits to be made under paragraph (2) hereof shall be made on demand, the aggregate, or so much thereof as may be necessary, shall be used for the [404—74] payment of the assessment on stock of shareholders who shall fail or refuse to pay their assessment as required by law, and any stock so purchased shall be held for the account of the persons named in paragraph 3 hereof in the proportion that the amount subscribed by each bears to the total subscription of $927,600.

6. None of the funds deposited or to be deposited in first party shall be used for any purpose other than for the payment of assessment on stock of said first party and no deposits made or to be made shall be refunded until said assessment has been paid in full following which any deposits remaining shall be returned to the respective depositors." (R., 28–281.)

(Testimony of M. Skinner.)

Thereupon with respect to the Bank building the witness SKINNER was asked the following questions and made the following answers, and the record shows the following proceeding:

Q. Under what you have as building account. And the total value means the purchase price?

A. Yes.

Q. That is the amount the Bank paid for it?

A. That is according to the resolutions in the minutes $1,690,000.

Q. And you remember I asked about the charge-off of $490,000? That is the difference between $1,200,000 and $1,690,000.

A. Well, I will explain the transaction if you wish me to.

Q. What I am trying to get at is, so we will understand these items.

A. I will explain them.

Q. The first is the purchase price? A. Yes.

Q. The next is the account of the mortgage?

A. Less mortgage would leave $890,000; then was an appreciation put upon the books of the value of this property, to bring the net book value of the property to $1,200,000; therefore there was an appreciation in value over and above the purchase price of $310,000; that $310,000 I understand is what you want explained; what was done with it; that is it?

Q. Yes—no; just a minute. Does that give you what you carry on your books? In other words

(Testimony of M. Skinner.)

what you have done here is to arrive at how you are carrying the $1,200,000? A. Yes, sir.

Q. Then you show on this statement, where you show an appreciation of $310,000 you satisfied it by debit to "Profit & Loss Account"?

A. Credit to Profit and Loss.

Q. Credit to Profit and Loss account, $300,206.84 and to adjust miscellaneous items $9,793.16?

A. That is correct.

Q. Making $310,000. Is that it?

A. That is right. [405—75]

Q. What I want to know, and what I asked, is this. Are we to understand from this that the way you handled the transaction that building really cost you $2,000,000?

Mr. HART.—No, Mr. Bristol: Let me explain. They stepped up their figures on the book there, the value of the Bank building on the books, from the original purchase, up $310,000.

COURT.—To $2,000,000?

A. Yes, sir.

Mr. HART.—Taking up what they believed to be the appreciation in value of the building.

Mr. BRISTOL.—What I am trying to arrive at is, you mean in this paper that your book account shows that Bank building cost you $2,000,000?

A. Yes.

Mr. HART.—No, nothing of the sort.

A. Including the mortgage.

Mr. HART.—Doesn't show any such thing. The building didn't cost that. The final figure you

(Testimony of M. Skinner.)

have there is the cost plus appreciation, which is a matter of judgment.

COURT.—Bought the building for $1,690,000, and then added $310,000 to that for appreciation?

A. That makes $2,000,000; but it was carried on the books at $2,000,000 less the mortgage.

Mr. HAMPSON.—The books don't show they paid $2,000,000 for it.

Mr. BRISTOL.—That is what I asked you.

Mr. MAGUIRE.—Your question was whether he carried that on the books as part of the cost of the building.

Q. Now, having regard to His Honor's question, what you mean by this paper as showing the exact condition—I am not talking about what you mention as a few dollars—you take this amount that you appreciate, and you make a credit, you say. That is what you said, when I said debit—you made a credit to Profit and Loss of $300,206.84 and you also made a credit to adjust Miscellaneous Items, whatever that is, for $9,793.18, showing how the $310,000 appreciation was taken up?

A. Yes.

Q. Now I say again, that on the books of your Bank your building at that transaction as shown, having relation to the board of directors meeting that I asked you about is that the cost of the building to the Bank was $2,000,000.

Mr. HART.—What is the use of stating it that way. The cost was not that.

COURT.—It looks from what I can gather that

(Testimony of M. Skinner.)

they simply swelled the assets $310,000, and in order to get the $310,000 into Profit and Loss—bookkeeping.

A. That is correct.

Mr. HART.—This building had become worth that and more than that.

COURT.—According to their estimate, yes.

Mr. HART.—The building later sold for more than that, if your Honor please.

COURT.—In other words bought the building for $1,690,000 and considered it worth $2,000,000?

A. Yes, that is correct. [406—76]

Mr. HART.—After its value increased, yes. That gave them three hundred thousand surplus, which they used in charging as a credit to Profit and Loss.

COURT.—That is more bookkeeping.

Mr. HART.—That is all.

Q. Is that an Executive Committee meeting which was on your book now, February 24, 1925?

A. Yes, sir.

Q. Now it says in here that Mr. Olmstead said that they had consummated the purchase of the bank building at a cost of $1,690,000, and that the property would be carried on the books at $1,200,000 and the payment of a mortgage of $800,000 assumed.

A. That makes your two million.

Q. Now I ask you if the difference between the $1,200,000 the purchase price of the building, and the $1,690,000—that is what I asked you about—is

(Testimony of M. Skinner.)

$490,000, and that is the paper you bring in to satisfy that question?

A. Yes, sir." (R., 282–286.)

Thereupon complainants' complaints (Exhibit 1) was offered in evidence.

Thereupon the original examiner's report of June 24, 1924, was shown the witness SKINNER and as produced by him known as the "Otto report" and the matters heretofore set forth in the proceedings of 1924 were therefore specifically enumerated and specially referred to as of the date of June 14, 1924, and *thwew* was then overdue paper of $362,882.62 and Bad Debts of $1,116,481.44; and Other Overdue paper of $620,447.27, and the total footing as of June 14, 1924, was $1,736,928.66.

Thereupon Mr. Hart as Chief Counsel called attention to the application of Section 5204 of the Revised Statutes; then Mr. Logan, attorney for Mr. Morden stated that the same rule applied in the state as in the United States, and the following took place: [407—77]

"Mr. BRISTOL.—All I want to say about that is that the officers have this information right under their noses and as your Honor has already announced in the criminal case, and I have heard you do it, people don't have to go into this business if they don't want to, and when they go in they go in with knowledge of what they have to do.

Q. Now, as quickly as we can, I would like you to answer me this please. Did you find in that report, under the same heading of Overdue Paper, Statu-

(Testimony of M. Skinner.)

tory Bad Debts and Other Overdue Paper, in accordance with Section 5204 of the Revised Statutes of the United States, which is printed on here, O. Anderson, for instance, and others; you may look through yourself; they are listed in the complainants' complaint, and to which Mr. Hart referred, as early as June 14, 1924.

Mr. HART.—You say were they in there as early as that. Indeed they were, much earlier, some of them.

Mr. BRISTOL.—All right; that answers the question.

Q. Now, were they still being administered upon by your bank and checked by you June 14, 1924, in accordance with his pointing out—meaning Otto—pointing out to you directions in regard to some?

Mr. HART.—The records speak for themselves in regard to that.

Mr. BRISTOL.—I asked if he knew about it as an officer.

Mr. HART.—I don't think you can ask him to give you what the records show over a period of years.

Mr. BRISTOL.—Are those things listed in complainants' complaint, referred to by you in this report as criticisms of bad paper as of that date?

Mr. HART.—Undoubtedly some of them may be, those that have not been charged off on which losses may have been ascertained.

Mr. BRISTOL.—With reference to your own statement to the Court, you told the Court there was

(Testimony of M. Skinner.)

active administration upon these, and that plaintiffs' statement had been grossly exaggerated, and that there were no such losses as claimed.

Q. Have you found any at all, did you find any?

A. Some of these collections are listed there.

Q. In order to be specific, I call your attention to A. O. Anderson. Doesn't that state that A. O. Anderson in a certain amount is slow, and if so read the amount it states at that time.

A. List A. O. Anderson & Company loans in the amount of $91,330.40 on that date, of which he estimates 60% to be doubtful, and $31,330.40 to be lost.

Q. June 14, 1924?

A. That was his estimate, yes. I notice, however, that there was $19,800 paid on it very shortly afterward.

Q. What is not his writing, that is somebody else's. A. That is ours.

Q. I will get to that after a time. Here is A. Rupert for instance.

A. Under this particular heading they list A. Rupert & Company Inc. loans amounting to $25,747.93, listing the same amount as slow. [408—78]

Q. That is of date June 14th? A. Yes.

Q. Do you find any reference to D. M. Stewart?

A. He lists D. M. Stewart loan of that date $44,221.20, and the same amount as slow.

Q. Now did you bring the one of 1925, the first one? A. February 2, 1925.

Q. Before we come to that, I call your attention to this again. Now, he divides his report appar-

(Testimony of M. Skinner.)

ently into large line—you note I call your attention to that? A. Yes.

Q. Under large lines you find Bankers Discount and Oregon Agricultural, B. F. Wilson and M. F. Jones, do you? A. Yes.

Q. And those marks that are on here are checkings and workings of the people in the bank?

A. Yes.

Q. And the original figures of these large lines at that time and his criticisms of it, total how much?

A. $770,112.14.

Q. Now in that very thing you find also, don't you, Dudur Farm & Fruit Company, and the amount of that is how much?

A. $524,746.97, including bonds, securities and notes.

Q. Now, I call your attention to the same June 14, 1924, report still under the heading of Large Lines, and ask if you find there set forth before you matter in addition to that which was by your Board recorded, having regard to this report being read, concerning J. E. Wheeler and the 'Telegram,' and matters otherwise alleged in the complainants' complaint, that you heard Mr. Hart speak about to the Court, and items we have been pursuing here?

A. I find reference to—did you mention any name?

Q. Wheeler and 'The Telegram' and the rest of them.

A. I find mention of their obligations here.

Q. And this matter that he has on—

(Testimony of M. Skinner.)

A. Page six, insert 5.

Q. Page six, insert 5, commences with the words, "Entire Line."

A. This has reference to that up there.

Q. All right. Then that means the list?

A. Yes, as having to do with this paragraph.

Q. You understand the matter I am showing, which is to shorten up and connect the items already given to the Court out of your big book, $584,500 referred to in that letter? A. Yes, sir.

Q. Now, these items as he shows them, and that are on the books, are covered by these comments, are they not, as I show you? A. Yes.

Q. And J. E. Wheeler appears there, $86,000?

A. Yes.

Q. And the Wheeler Timber Co. appears there as $90,000? A. Yes.

Q. And under L. R., brother of J. E. Wheeler, as that reads, appears $106,500? [409—79]

A. Yes, sir.

Q. And the W. G. Wheeler Estate, J. E. Wheeler, executor, appears as $95,500? A. Yes, sir.

Q. Telegram Publishing Company, J. R. and L. R. Wheeler $120,000? A. Yes, sir.

Q. McCormick Lumber Company, managed by J. E. Wheeler $86,500? A. That is correct.

Q. Then he brings his total out.

A. $584,500.

Q. Then he follows with this writing, does he not?

A. He does.

Q. 'Line reduced about $60,000 since last ex-

(Testimony of M. Skinner.)

amination. J. E. Wheeler's statement shows net worth $4,515,000 consisting largely of timber holdings. L. R. Wheeler shows net worth $1,660,000 consisting mostly of timber holdings. Bank officials state Wheelers have a deal pending covering sale of 50,000 acres of timber on Rogue River, in Oregon and expect to get about $3,500,000 for it. Are considering purchase by one of the largest lumber manufacturers in the United States. If deal goes through it is said entire line will be liquidated. McCormick Lumber Company makes a statement showing net worth of $1,047,000 consisting largely of plant and timber. Wheeler Brothers own the Telegram, a local evening newspaper company, statement shows net worth $671,000 mostly franchise and fixed assets; not making any money. The above line is safe, but has become quite permanent, and should be liquidated.' Is that correct?

A. That is what it says there." (R., 292–297.)

Thereupon the report of the Examiner February 2, 1925, was shown the witness and the following questions and answers were given:

"Q. Now, will you please state to me what that Examiner's report of the condition as of February 2, 1925, referred to in the record I read before, showed to be the Capital, Surplus and Undivided Profits, on the date of February 2, 1925?

A. $2,461,420.36.

Q. That includes Capital, Surplus and Undivided Profits?

(Testimony of M. Skinner.)

A. Yes, that is net undivided profits after the expenses are taken out.

Q. Now, will you look and tell me please, on that report, having reference to the same item Mr. Hart spoke about, Statutory Bad Debts and Overdue Paper, what he lists there as your total of that date?

A. Total Bad Debts as defined by the Section amounted to $780,465.27. That is what you mean, did you?

Q. I asked for total Overdue Paper, including Bad Debts.

A. All right, I will change that. $1,207,668.47.

Q. And at this date we find A. O. Anderson here listed as a loss for the same amount, don't we?

A. We do. This is estimated.

Q. We find Glenn Miller listed also as a loss, don't we?

A. To the extent of $9,000.00. [410—80]

Q. And we find A. Rupert, as far as that June 14, 1924, report is concerned, the only difference and change at all is that he has—the amount is the same, and he carries it over into the doubtful column, does he not?

A. He carries a portion of it into the doubtful column; $23,173.93 in the doubtful column; slow $2,574.00.

Q. At that time he also—does the report refer to the Bankers Discount Corporation?

A. Under another heading, yes; Slow and Doubtful Paper.

(Testimony of M. Skinner.)

Q. And losses on current Loans? A. It does.

Q. And also refers to the Dufur Farm & Fruit Company, and indicates what?

A. Lists the amount as $137,317.52, which he estimates as lost.

Q. Just state whether that report shows as of that date, to wit, February 2, 1925, that the Wheeler items as appeared on the June 14, 1924 report, were again called to the attention of your bank?

A. They were.

Q. And again upon what you call Insert 1–B, page 6. A. Large Lines.

Q. Itemized amounts of the Wheeler paper, Telegram Publishing Company, are set out again, are they not?

A. Same paper. In other words, he refers to the same notes, under different headings, in every report, in some instances.

Q. Well, with respect to that now; whether they are under the same headings in different reports, or not. Tell me please, whether on February 2d he made any comments which went to your Board concerning this what you call, I suppose Large Wheeler Line. Is that what you mean?

A. That is what he calls them, Large Lines.

Q. So we don't misunderstand each other, they are Wheeler, J. E. and the Wheeler Timber Company, and L. R. Wheeler, W. G. Wheeler Estate, the Telegram Publishing Company, and the McCormick Lumber Company. They are all mentioned?

A. Yes.

(Testimony of M. Skinner.)

Q. And this matter that is here shown on the report, is as follows, is it not? 'All above list slow and current loan; no change in their line except Wheeler Timber Company has been increased $7,500, J. E. Wheeler's statement under date January 1, 1923, shows net worth $4,515,000, consisting almost entirely of equities and stocks in timber holdings companies belonging to Wheeler family and estate. No statement filed for Wheeler Timber Company, J. E. and L. R. Wheeler own the Telegram Publishing Company, which publishes a daily newspaper in Portland. It is claimed the Hearsts have offered one million for the paper. Refused to sell. Statement of Publishing Company shows net worth of $671,000. McCormick Lumber Company makes statement showing net worth of $1,886,565 consisting largely of timber holdings. Payment of the above line depends upon sale of some timber holdings of the Wheeler family and Estate. [411—81] A written statement of holdings shows that the family and estate own and control over two hundred thousand acres of timber approximating fifteen billion feet, besides other eastern holdings. J. E. Wheeler shows his personal interest as $5,450,000. Liquidation of this line should be insisted upon. Capital in character and fixed.'

Q. Is that right?

A. That is part of it." (R., 297–300.)

Thereupon the witness produced the Wyld report of March 25, 1926, and identified the same, and he was asked what it showed about the Wheeler Mc-

(Testimony of M. Skinner.)

Cormick Line and he said that under the heading of Large Lines that was shown and that the report disclosed a complete history as of the date shown by the report as follows:

"J. E. Wheeler, direct loans	236,000.00
J. E. Wheeler (sundry drafts in bills in transit) discounted	99,100.00
McCormick Lumber Company (protested checks in cash items)	36,503.50
Wheeler-Olmstead Company (protested checks in cash items)	11,000.00
Wheeler Timber Company	97,500.00
W. E. Wheeler Estate	95,500.00
Telegram Publishing Company	120,000.00
Overdraft	261.78
. R. Wheeler	106,500.00
	$802,365.28

Loans to J. E. Wheeler unchanged since previous examination, again classified as Slow.

Sundry Drafts in transit, discounted by J. E. Wheeler, are drawn by J. E. Wheeler on W. M. Wheeler, of San Francisco, the Wheeler Timber Company of San Francisco, and William Smearbaugh, of Pennsylvania, while not classified in this report, are carried in an account "Bills in Transit" and should be carried in Loans and Discounts. One draft for $21,900, drawn on W. M. Wheeler is a renewal.

The McCormick Lumber Company protested checks and the Wheeler-Olmstead Company pro-

tested checks, both carried as Cash Items, were eliminated during the examination, having been taken up by J. E. Wheeler and the McCormick Lumber Company. The original checks were payable to and credited to the account of J. E. Wheeler, and at this examination [412—82] classed as an excess loan, with the direct liability of J. E. Wheeler. (See Excess Loan Schedule.)

Loans to the Wheeler Timber Company, the W. E. Wheeler Estate, and the Telegram Publishing Company, all secured with a guaranty of J. E. Wheeler, are unchanged since the previous examination, and all classified Slow in this report.

Loans to L. R. Wheeler, who also guaranteed the loan to the Telegram Publishing Company, are unchanged since the previous examination, and again classified slow.

The only change in the entire line since the previous examination is the elimination of the McCormick Lumber Company's indebtedness of $86,500, which was paid through proceeds of a bond issue, and the addition to the line of the discounts and cash items listed above.

At the previous examination J. E. Wheeler made an assignment to the Portland Trust Company, as trustee, of his one-eighth interest in timber lands situated in Tillamook County, and one-sixteenth interest in timber lands situated in Yamhill County; also the following stock to secure his entire direct and indirect indebtedness to this Bank.

88 shares of Silver Fork Lumber Company
40 shares of W. H. Peters Logging Company

43 shares of McCormick Lumber Company
255 shares of Browns-Wheeler Company
380 shares of W. E. Wheeler Company

This collateral was also pledged as a secondary lien to an indebtedness owing a Bank in San Francisco, where it is said the agreement had been forwarded but not returned. President Olmstead gives assurance that Wheeler has arranged his affairs so that a material reduction will be obtained on this line within the near future, either through sale of some of Wheeler's holdings, or a bond issue against the same." (R., 302–304.)

That this report also referred to the Michellvi Sheep Company, and the witness showed that there was listed on that account $350,212.06, including overdraft and investment in stocks and bonds in behalf of the Bank, and that as of March 25, 1926, with respect to Dufur Fruit & Farm Company $295,-565.68.

Thereupon the witness produced the report of the Bank Examiner T. E. Harris of September 21, 1926, and therefrom informed the Court that the total amount of assets scheduled for examination and considered nonbankable was $2,621,240.05, and that the amount then doubtful was $490,468.74; that the amount of [413—83] Slow was $809,747.25; and the witness was then asked if this report showed anything about the Michellvi Sheep Company and the Dufur Farm & Orchards, and the witness then read from the report as made to the Bank and communicated to the directors the following information as then given in evidence:

(Testimony of M. Skinner.)

"A. September 21, 1926, Item 7: Under 'Criticisms.' Lenient credit policies which have not only resulted in heavy losses but have carried this institution entirely beyond its legitimate field of banking and made it a partner and in some instances sole owner of other business which it now directly or indirectly operates. I may refer to, (a) Bi-State Investment Company, $501,985.55; (b) Dufur Farm and Fruit Co., approximately $300,000; (c) Davin Michellod Sheep & Land Co., $321,150.00; (d) two-thirds interest in Boulder Creek Lumber Company, $77,490. (in addition to a small loan); (e) M. L. Jones-Oregon Agricultural Co. lines $244,681.63; (f) Kelly Ranch Line approximately $190,000. The foregoing items aggregate more than $1,500,000, and are investments which your examiner considers as entirely outside the purpose for which banks are chartered." (R., 306.)

Thereupon the witness identified the report made by T. E. Harris of March 5, 1927, and said that on page 7 of that report Harris made a recapitulation of the Losses, Slow and Doubtful Paper, and the witness was asked to tell what was shown as the then condition of the Bank under that report and he answered as follows:

"A. Under recapitulation, total Slow $2,473,948.89; Doubtful $347,025.39; Estimated Losses $2,446,569.19; Appreciation under head of Bonds, Securities, etc. $25,647.86.

(Testimony of M. Skinner.)

Q. This is the report that is in this other book as of date March 5, 1927, before the Board?

A. That is referred to; letter of March 18th.

Q. Now this being 1927, I call your attention to Davin Michellvi Sheep Company as to the amount then carried in the books at the date of this report, March 5, 1927, if he showed anything?

A. He did.

Q. What did he say it was, the amount carried on the books? [414—84] A. $273,259.97.

Q. Now we go to the McCormick Lumber Company. What did he say, if anything, of the McCormick Lumber Company and J. E. Wheeler?

A. The same heading, please?

Q. That is, the amount carried on the books.

A. It is under the heading of Bonds, Securities, etc., Claims Account; this is a subdivision Claims Account, under the general heading Bonds, Securities, etc.

Q. All right, all right, I asked you if he stated what the total amount of the McCormick Lumber Company and J. E. Wheeler was.

A. Yes, sir. McCormick Lumber Company and J. E. Wheeler, $796,762.00.

Q. What does he say about that?

A. $791,662 loss estimated on the Wheeler Line. Other Large Lines have comment on this item.

Q. Now, I call your attention to whether or not under Excess Loans he has listed anything that we have been talking about concerning the Dufur Fruit & Farm or the Davin Michellvi Sheep Com-

(Testimony of M. Skinner.)

pany, and the Wheeler line. If he does, tell me what the report shows.

A. The total Wheeler lines, Excess Loans he heads this, and Total Wheeler Lines; Total Wheeler lines is $1,126,662, covering checks of the McCormick Lumber Company and drafts on the Wheeler Timber Company referred to just above this, of $796,762.

Q. Seven nine one?

A. Seven nine one, he has it here, less five items believed to be loss estimated $791,662. That is the amount of these checks.

Q. Well, go ahead, what does the report show?

A. 'The following items are not classified as excessive loans but they are noted here for future reference. The exigencies of this examination are such that I have not had the opportunity to trace the origin of these items so as to determine whether they are in violation of Section 5200, U. S. R. R.

Dufur Fruit & Farm Company (Bonds)			267,000
Loss now estimated of $179,500			
and previous losses have been taken.			
The Item in loans is a receiver's certificate, not subject to the limit.			
Davin Michellod Sheep &			
Land Co.	Stock	$273,259.97	
do	Loans	36,088.65	
			309,348.62
$173,259.97 loss estimated.			
Bi-State Investment Company			503,883.19

(Testimony of M. Skinner.)

$250,000 loss estimated.

Oregon Agricultural Co.—Claims 256,068.90''

(R. 307-309.) [415—85]

The witness was then asked about the Examining Committee's reports and he testified that between the 18th of May, 1926, and the 7th day of December, 1926, there was not Examining Committee report but that the December 7, 1926, report was begun on November 19, 1926, and the report was finally completed as of December 7, 1926, and that there was no report of the Committee in November, 1926.

Thereupon this witness on cross-examination showed that at the stockholders' meeting of January 11, 1927, Charles Burckhardt, complainant, was represented at that meeting by Lawrence McNary and that at that meeting there was a resolution adopted with reference to the approval or —— of the acts of the directors for the preceding year, and that resolution was adopted unanimously without any dissenting vote, and in the meeting of January, 1926, Burckhardt was represented by J. N. Casey; and at that meeting for the acts of the directors during the year 1925 there was a resolution ratifying and confirming such acts, and that in January, 1925, Burckhardt was present by a proxy, Dean Vincent by name, who voted all the stock; that for the year 1924 he did not find either the name of Ballin or Burckhardt but in 1923 Burckhardt was represented by DeGraff, and in 1923 Burckhardt was represented by proxy Dean

(Testimony of M. Skinner.)

Vincent of the Portland Trust Company, of which DeGraff, the former proxy was also a member. In January, 1927, the Ballin stock was voted in the name of Francis Graves by George Black, Jr., and according to the witness confirming the [416—86] acts of the directors; that in the meeting of May 3, 1927, Palmer Fales voted the Graves stock as proxy. At the meetings of the stockholders in January, 1928, there was a proxy accompanied by the letter of Fred A. Ballin that was the same stock originally issued to Ballin and was standing in Ballin's name at the time of the meeting, and when he was asked as to whether Ballin ceased to be a stockholder of the Bank he said he did not think any record of that was available; and the witness testified, however, that the Ballin stock was transferred to Graves October 18, 1926.

The witness then testified that a resolution was passed October 9, 1924, for the purpose of covering or taking care of indebtedness created by Wheelar's checks returned drawn on Eastern and outside banks and returned unpaid, and that on that day the officers were informed that some of these checks had been returned in a substantial amount and Wheeler came into the Bank and said that certain credits which he had forwarded to banks and on which he had drawn these checks and which he expected to receive credit for had not been given and, therefore, the checks had been refused, and he said this to the witness Skinner and Chas. H. Stewart, but the witness thought Mr. Olmstead

(Testimony of M. Skinner.)

was out of the city and the witness asked Wheeler to cover the checks and take them up and Wheeler mentioned of his own accord that there was probably some others that would come back and he might need additional funds and he wanted an additional loan as a temporary advance, and I told him that I would [417—87] have to go before the board of directors, and he asked me to refer the matter to the Committee to loan the Wheeler Timber Company $50,000, McCormick Lumber Company $100,000, Portland Telegram $100,000 and J. E. Wheeler $100,000. The matter was submitted to the Executive Committee in October 1924, and authorization was given; the witness added that the resolution stated that three or four of the directors stated they did not know about this overdraft, and the witness then stated they did not know until the checks came back $250,000 of the allotment was borrowed. The Telegram paid back its $100,000 and a little while thereafter McCormick Lumber Company paid back its $100,000, and the Wheeler Timber Company was paid down to $75,000.

Thereupon counsel for defendant wanted to show there was nothing improper in stepping up the Bank Building on the books of the Bank, and he was allowed to show that the sale price was $2,200,000, and the witness so testified.

Thereupon with reference to the Examiner's report hereinbefore referred to this witness on cross-examination testified as follows:

"Q. Your attention was drawn to a number of

(Testimony of M. Skinner.)

reports of Examiners 1924, 1925, 1926 and 1927. Will you state whether or not the examination made by the Federal Examiner in September, 1926, was a regular examination, regular periodical examination, or whether it was a special examination, and if a special examination, state what the occasion for it was.

A. That examination was made at our request, or upon an agreement with the Comptroller of the Currency. We had Mr. Harris himself then Chief Examiner, examine the bank prior to the time that we would put into effect [418—88] organization of a company, as I recall it, outside company.

Q. That is the Directors asked the Comptroller of the Currency to have the Chief Examiner, Mr. Harris? A. Yes.

Q. Make the yearly examination? A. Yes.

Q. And developed the fullest extent to which it would be desirable to charge off everything in order that the organization of a liquidating company, and the transfer of the assets to it, might enable the bank to resume the payment of dividends?

A. That is correct.

Q. And you know, don't you, that the plan which was under consideration involved the taking out of $1,500,000 of assets? A. It did.

Q. Now, reference was made also to an examination and report of an examination of the bank of March 5, 1927? A. Yes.

Q. State whether or not that was a regular

(Testimony of M. Skinner.)

periodical examination, or whether that was a special examination?

A. It was a special examination made at our request.

Q. By whom?

A. T. E. Harris, Chief Examiner.

Q. What was the occasion or purpose for that examination?

A. To establish a basis for 100% assessment on the stock.

Q. That was after the so-called float had been discovered, was it not? A. Yes.

Q. And is it a fact that at that time the Directors had determined upon a 100% assessment?

A. They had.

Q. And is it a fact that they had determined to make that assessment an involuntary one if it couldn't be made voluntarily? A. Yes.

Q. And is it a fact that this examination was requested so that a basis for an involuntary assessment might be secured? A. Yes.

Q. And what did that mean, in the way of taking out assets? What did it call upon the Chief Examiner to do?

A. It became necessary for him to list as non-bankable doubtful paper, or losses, an amount of the bank's assets which would justify a 100% assessment.

Q. Do you know whether that subject was discussed between Mr. Harris and the officers of the bank? A. It certainly was.

(Testimony of M. Skinner.)

Q. During the examination? A. Yes.

Q. Do you know whether Mr. Harris had any difficulty in finding enough assets which he could justifiably eliminate to bring the total up so he might be able to make 100% assessment necessary? [419—89]

A. My recollection is he had some difficulty in finding the amount." (R. 329–331.)

And thereupon on redirect examination this witness testified as follows:

"Q. That report of June 14, 1924, that you produced was that a special or regular report?

A. As far as I know that was a regular call.

Q. What was that?

A. I think it was a regular examination.

Q. Now, what was the next one, in February, 1925. A. February 2d.

Q. Was that a regular examination, or a special examination?

A. I would call that a regular examination.

Q. Same as of June 14, 1924? A. Yes.

Q. Now, your first one in 1926; what date is that?

A. March 25th.

Q. What you called the Wylde report, isn't it?

A. Yes.

Q. What was that, regular or special?

A. Regular.

Q. Now, you do say, however, that the report of September, 1926, was made at the request of the representatives of the bank? A. What date?

Q. September 19, 1925. A. Yes, sir.

(Testimony of M. Skinner.)

Q. You do say that was made at special request?

A. Yes, sir.

Q. Of the representatives of the bank?

A. That is my understanding.

Q. And you do say that the report of March 5, 1927, was made at the special request of the officers of the bank? A. Yes, sir.

Q. And you say the purpose of the 19th of September report was to set a basis for the new take-over company?

A. That had been the understanding with the Comptroller at the meeting—

Q. What?

A. That was in accordance with the understanding with the Comptroller.

Q. I didn't ask anything about any understanding with the Comptroller. I asked if you didn't say the September 19th examination was a requested examination, for the purpose of setting a basis for a new take-over company; isn't that what you said? A. Yes, sir.

A. And I asked you as to the March 5, 1927; you say that was to establish a 100% voluntary assessment?

COURT.—Involuntary.

Mr. HART.—Involuntary.

Q. Wait a minute; I want to find out whether you didn't propose a voluntary or involuntary; let's get it; what did you say, sir, again? [420—90] Did you say that was to establish a 100% volun-

(Testimony of M. Skinner.)

tary assessment or was the basis for a 100% involuntary assessment?

A. It would be for the purpose of establishing an involuntary assessment couldn't be arranged.

Q. So that when Mr. Hart spoke about a voluntary assessment to you and you answered, you knew as a banker that a voluntary assessment without unanimous consent couldn't be made, didn't you?

Mr. HART.—My question was perfectly clear, and the answer was clear.

Mr. BRISTOL.—It may be so, but this is redirect examination. You told me I would have to find out if I didn't like the way you asked the questions.

Mr. HART.—You musn't misquote me, Mr. Bristol.

Mr. BRISTOL.—I am not.

COURT.—Perfectly clear; I think I understand the question.

Q. Will you be kind enough to indulge me with the same particularity you indulge the other counsel, to look at that meeting of the 3d of May again; and when I asked you to read in the record the other matter in regard to the famous proxy, you were about to do so, and also the one of January 10, 1928, when counsel stopped you. Now, take page 477 and look if you please at the proxy that accompanies Ballin's stock, that I personally handed you myself, and all the accompanying papers with regard thereto, if you have them in that record.

(Testimony of M. Skinner.)

A. I have attached to the record here a letter signed by Fred A. Ballin, of date December 14, 1927, addressed to Francis P. Graves & Company, No. 600 California Bank Building, Los Angeles, California.

Q. This, so the Court understands, is attached to this you told Mr. Hart was the various proxies, isn't it? A. Yes, sir.

Q. Now read it in so the Court can get an understanding of it.

A. 'Gentlemen, in connection with the 200 shares of the capital stock of the Northwestern National Bank of Portland, Oregon, that you are holding in your name on the books of the corporation, but which belongs to me, and is being held by you for my benefit, I hereby authorize you to execute a proxy appointing William C. Bristol as your proxy to vote said stock at the annual meeting of the shareholders of said banking corporation to be held January 10, 1928, in Portland, Oregon. Very truly yours, signed Fred A. Ballin.' This is attached to proxy—

Q. That paper is attached to proxy you read to Mr. Hart, isn't it? A. Yes, sir.

Q. And that is the issued—it is witnessed, is it?

A. It is witnessed.

Q. And it was pursuant to that particular paper that you and Mr. George Black of Platt, Fales & Smith's office, checked up the allowance of the proxies, etc., for the meeting, didn't you?

A. Yes, sir.

(Testimony of M. Skinner.)

Q. And you had that in hand before we went into the meeting, didn't you? A. Yes, sir.

Q. And you also as secretary recorded the vote "no" that I entered there for both Ballin and Burckhardt, didn't you?

A. I did." (R., 331–335.) [421—91]

TESTIMONY OF L. B. MENEFEE, FOR COMPLAINANTS.

There was evidenced from the witness L. B. MENEFEE that he sold his stock the 10th day of March, 1923, consisting of 4,200 shares, being his own and that of Mr. Standifer and Mr. Jones, to Mr. Olmstead, which included the stock he first acquired when the bank started as well as stock that came to him upon the increase of the capital stock of January, 1922, and which Olmstead told him he would take off his hands; that his successor director was nominated on September 25, 1923, and was E. S. Collins; that he and Mr. Price talked over the sale of the Bank sometime in February, 1923, with J. C. Ainsworth in Mr. Ainsworth's office in the United States National Bank in Portland, Oregon. That he did not remember anything about the details at all, and when pressed for details about his recollection his habitual answer was that he didn't remember. Whereupon, the Court enquired whether or not there was anyone in the courtroom who was able to tell of his appointment as a member

(Testimony of L. B. Menefee.)

of the Examining Committee of the Bank, and the following statement was made in the record:

"Mr. HART.—Yes, I can state it from the record. Mr. Menefee was appointed as a member of the Examining Committee in January, 1923, but before that Examining Committee undertook any examination Mr. Menefee had sold his stock, and someone was put in his place. Now his position as director was not filled until September, but of course he didn't act either as a director, or as a member of the examining committee, after he disqualified himself by selling his stock.

Mr. BRISTOL.—Well, then it is in the record that he did act as a member of the Examining Committee.

COURT.—He was appointed as a member of the Examining Committee.

Mr. BRISTOL.—Was appointed a member, and acted as such up to the time that he sold his stock. [422—92]

"Mr. HART. — No, that is not my admission. The Examining Committee made one or more examinations each year; the first examination had not been made when Mr. Menefee sold his stock." (R., 346.)

The attention of the witness was called to page 21 of the book record of May 22, 1923, wherein it was recited that the Chairman appointed Mr. Spalding to act as a director for the coming year in place of Mr. Menefee. Upon the witness being pressed for his recollection, the Court remarked:

(Testimony of L. B. Menefee.)

"COURT.—You don't expect a business man to remember every incident that occurred in the transaction of business of that kind back as far as 1923? * * * (R., 346–47.)

Mr. BRISTOL.—Well, it would seem to me that in a matter of so much importance as a $600,000 investment, that I would have some recollection. * * * "

Thereupon the witness was asked:

"Q. Who was it that was on that board, in accordance with the by-laws, to which I called your attention, and the executive committee by-laws as well, that were the active, managing directors of that bank while you were there?

A. Well, I think Mr. Olmstead was the active member of the bank.

Q. How is that?

A. Mr. Olmstead.

Q. Was the active, managing director? Mr. Olmstead was the president, wasn't he?

A. Yes, he was president.

Q. Who were the directors that were the active ones in the bank at the time you were there, up to the time you say you sold your stock in 1923?

A. Well, Mr. Price, Mr. Metschan, and all the directors. Mr. Spalding. I have forgotten; I have really forgotten what directors. Mr. Charlton and Mr. Pittock." (R., 348–349.)

The Court then asked:

"COURT.—Did you talk with Mr. Spalding about it?

(Testimony of L. B. Menefee.)

Q. Do you recall whether or not prior to March 10, 1923, and between the annual stockholders' meeting on that date, when you say you sold your stock —do you recall whether you also discussed the condition of the bank with Mr. Spalding? [423—93]

A. I don't recall any time that I talked with Mr. Spalding. I am sure I did, though; that I discussed it with Mr. Spalding. We stood in the bank there and discussed it a great deal, at different times.

Q. How about Mr. Charlton?

A. Well, I probably talked with Mr. Charlton." (R., 350–351.)

Thereupon the witness testified that prior to the time he sold his stock, in March, 1923, he did not think anybody had called his attention to any condition in the bank; that he did not remember whether or not he saw the reports in the year 1922. He did not remember whether he saw the reports of September, 1922, or not.

Upon cross-examination this witness testified as follows:

Q. "Mr. Menefee, you have not disclosed to any of the attorneys for the defense in this case, that you had been subpoenaed, did you?

A. No, I think not.

Q. You haven't talked over with any of us what testimony you might be called to give in the case?

A. No, sir.

Q. You sold your stock in March, 1923, but evidently your place as director was not filled until

(Testimony of L. B. Menefee.)

September, 1923. Now, you didn't act as director after you sold your stock did you? A. No.

Q. You say that the affairs of the bank—you did discuss the affairs of the bank with all the directors when you were on the Board. It is true, is it not, that all of them who were directors functioned as such while you were on the Board, that is, they attended meetings? A. Yes, sir.

Q. Took part in the affairs of the bank, did they?

A. Yes, I think so. [424—94]

Q. Is it true, also, that as far as you could observe, these different directors all interested themselves in the management of the bank, and exercised their best judgment on the questions put before them at the meetings, and at other times?

A. I think so." (R., 354–355.)

On redirect examination, this witness testified that he knew or thought he knew that there were a lot of bad loans in the Bank, or some doubtful loans, but did not know how bad they were, but that he did not look into them to see how bad they were, as any officer of a Bank might have done, and that he did not know of any director who looked into them to see about their badness or goodness, and that he could not name any director who did so.

The witness was then especially interrogated about some of the specific charges in the complaint, and answered that he knew nothing about them. He was then interrogated about the Baldwin Sheep Company, and said that he knew something about

(Testimony of L. B. Menefee.)

that company; that it was a company in Eastern Oregon in which he was interested, and had some stock in it; that Mr. Pittock was the principal owner, and that this concern owed the Bank some stock at the time he got out; that he knew as early as 1921 that there were transactions with the Evening Telegram and J. E. Wheeler, and that they were borrowers from the Bank, but that he thought the Wheeler loans were absolutely good, up to the time he left the bank; that he thought there were some small doubtful loans at the Bank, but didn't know just which ones they were, and that there were some loans at the Bank that he did not approve; that he did not discuss the good or bad loans with the other directors, and [425—95] that the directors from time to time passed on a good many loans; that there were no loans made in the Bank from March, 1912, down to March 10, 1923, the time he sold his stock, but that the directors approved them all; that Mr. Metchan and Mr. Charlton were on the executive committee with him; that they passed on the loans as Executive Committee first, and were brought to the Executive Committee by the officers of the Bank; that Mr. Skinner, Mr. Stewart, Mr. Mullitt, Mr. Lamping, and Mr. Olmstead were loaning officers at that time. (R., 363–364.)

A. C. Longshore was one of the officers of the Bank and had been with it ever since it started. That all the defendants successively named in the

(Testimony of L. B. Menefee.)

caption were his co-workers in the Bank; that Frank O. Bates was cashier up to the time the Bank closed, and he had become filing assistant and vice-president; that Skinner, Stewart and Olmstead were the principal loaning officers and continued to be such during the years they were identified with the Bank, in 1923, 1924, 1925 and 1926 and up to the time of closing; that Mr. Price, Mr. Jones, Mr. Brown, and himself, also made loans; that Mel Young was the general bookkeeper, and kept the record of the condition of the Bank up to the time it closed. Upon question and answer, the witness testified on that subject further as follows:

"Q. Suppose you as assistant vice-president, for illustration, wanted to find out the state of the Bank's finances, is that the record you would go to?

A. Yes, sir.

Q. And that was supposed to be the record that would tell from day to day the condition that the bank was in? A. Yes, sir.

Q. Was that always kept? A. Yes, sir. [426—96]

Q. Open and observable where anybody could see it that had a right to look at it?

A. Yes, sir.

Q. Now, coming to the matter specifically, so as to take up a lot of timber all at one time, was there an overdraft book kept? A. Yes, sir.

Q. Who kept that overdraft book, say, in 1926, '27, '25 and '24, if there was one kept during this period?

(Testimony of L. B. Menefee.)

A. It was prepared under the supervision of the auditor, but different minor employees took the record off the individual books and compiled them. Didn't have any one particular person over a period of time.

Q. You mean by that, that sundry particular employees of the bank would supply information which ultimately got into the book? A. Yes, sir.

Q. When the book was finally made up, if it ever reached that condition, where did it get to? Who had custody of it, and who kept it?

A. Well, 1926 and '27, it was left for the convenience of the officers, I believe, on top of Mr. Jones' desk. I wouldn't say positively, but I think that is where it was." (R., 376–377.)

The witness then testified that George Hoyt was assistant cashier and had charge of the exchange and collection departments and was authorized to sign drafts; that Mr. Fraley was auditor of the Bank.

That Mr. Horstman worked in the transit department, and that was different from the collection department; that Mr. Decker was in the collection department, which handled items that were left for collection and for which the Bank did not give immediate credit; that the transit department handled items drawn on outside banks which were taken for cash by the Bank, and for which credit had been given either by banks or customers.

By question and answer this witness then testified as follows:

(Testimony of L. B. Menefee.)

"Q. In other words, perhaps a more itemized detail or something of that sort would take a great deal of time to get together, but the total amount that would be represented—or what was carried by your bank, would be readily ascertained by resort to Horstman in the transit department, would it not?

A. Well, it shows right up on this statement every day. [427—97]

Q. Shows right up on the record?

A. Yes, sir.

Q. Was a book or leaf record; what kind of a record was it, the daily statement you spoke of?

A. He gets up a daily statement, yes, sir.

Q. He in turn then, this man Horstman, would send his items to Fraley or to the man who kept the general books?

A. Yes, part of them would go to the country bank ledger and part of them would go to the general ledger.

Q. And would show on each of those each day's business?

A. Yes, and they generally would be consolidated. (R., 393, 394.)

. . . . . .

Q. Now, for instance, when the committee reports 'We checked the notes, collateral and real estate,' where would they go, for instance, to check the notes? To the note department?

A. Yes, theoretically. But for a matter of convenience they usually took the notes up in our director's room and went over them up there.

(Testimony of L. B. Menefee.)

Q. They were the exact notes themselves along with the collateral? A. Yes.

Q. Now, in the event that these notes or transactions, whatever they were, had with them guarantees or other accompanying paper, would they, as a matter of the way you handled things, be altogether so they would all be seen at the same time?

A. No. . . .

Q. Would the collateral be in a different place than the note itself?

A. Well, the collateral page and the note page were adjoining pages. They were practically kept together, but when the directors went over the notes they wouldn't necessarily have the collateral at the same time. I suppose they would check that collateral in the collateral cage.

Q. Check the collateral right in the cage?

A. I would presume so.

Q. You say you presume. Now, can you say, as a fact, what they did do, if you know, usually, I mean, during that period while you were there, '24, '25 and '26, whether they checked the collateral right in the cage to save danger, probably, of carrying it upstairs or mixing it up for any other reason, I don't know what?

A. I don't remember of having been present at any time when the collateral was checked, personally.

Q. I show you a letter—and so your Honor understands, I had permission from the Government to withdraw this, and I shall put it back and I will

(Testimony of L. B. Menefee.)

identify it first. I show you a letter, and ask you if you have ever seen it before, and whether it bears your signature? A. Yes, sir.

Q. And you wrote it in the regular course of your duties as assistant vice president?

A. I didn't write it; I signed it. [428—98]

Q. Well, it is one of your official acts, then, for the Bank in the course of its business?

A. Yes, sir.

Q. And is in the original condition, except for some identification marks at the bottom, as it was when it left your hands? A. Yes, sir.

Mr. BRISTOL.—I propose to read this into the record and return it to Mr. Marsh, and am thereby offering it in evidence. Letter identified by the witness and on the letter-head of the Northwestern National Bank;

June 10, 1926.

Mr. J. E. Wheeler,
c/o Telegram Publishing Company,
City.

Dear Sir:

We acknowledge receipt of personal guarantee given by yourself to this Bank under date of June 8, 1926, covering loans made by this Bank to the McCormick Lumber Company, up to $240,000.00.

This guarantee is a continuing guarantee and under same we may continue from time to time to

(Testimony of L. B. Menefee.)

make advances to the McCormick Lumber Company up to $240,000.00.

Yours very truly,
A. C. LONGSHORE,
Assistant Vice President.

Q. Now, when there were such instances as guarantees of that kind would they be kept in the collateral cage you talked about or would they be kept elsewhere? A. Note department.

Q. Note department. In other words, they would be with the notes, probably not in the same pocket or pouch, I don't mean, but where they could be seen by anybody that was looking up a note?

A. Yes, sir. (R., 394, 395, 396, 397.)

. . . . . .

Q. I say I want to know from the general conduct of the Bank as you saw and observed it there, what would be done to find out precisely the general affairs of the Bank—other than what you talked about in that general statement, if at all.

A. If I understand you, Mr. Bristol, when they examined the notes, compiled their notes, they would have a list showing the total notes held by the Bank; when they checked the securities they would have a list showing the securities; when they checked the outstanding bills in transit they would have a total of that amount on the date examined, and so on through the other departments of the Bank.

Q. That is what I wanted to get at.

A. Then when they would complete it they would

(Testimony of L. B. Menefee.)

go and check those totals against our daily balance sheet for that day.

Q. That is what I wanted to get at. And that daily balance sheet is what you tell me was kept by this Mr. Mel Young? A. Yes, sir. [429—99]

. . . . . .

Q. Suppose I want to find out whether his particular transaction on that date was an overdraft or not?

A. Look at the individual ledger for his account.

Q. Is that open to everybody who has a right to inspect it—that has a bank right to inspect it?

A. Any official of the Bank, surely.

Q. And therefore it wouldn't make any difference whose account it was, it could be ascertained almost immediately whether there was an overdraft or not, couldn't it?

A. After the completion of the day's business when the items were posted; you see the items are not posted as fast as they come into the Bank. (R., 401.)

. . . . . .

Q. That is what I am driving at, and that continued all through 1925 and 1926, didn't it?

A. Yes, sir.

Q. Do you know of anything that would have prevented any Examining Committee or any director or any officer from seeing or knowing of any transaction in that Bank during 1925? If they had looked? A. No, sir.

(Testimony of L. B. Menefee.)

Q. Do you know of anything in that Bank that would have prevented an Examining Committee or any director or officer, if he had looked, ascertaining about the condition of affairs in that Bank in 1926? A. No, sir.

Q. Or in 1927? A. Not at any time.

Q. Now, during any of these times, fixing the time as of—well say from April 26, 1926, onward through 1926, was there ever brought to your attention, or did you know or ascertain about checks on anybody's account that was of any considerable amount being returned? A. Yes, sir.

Q. For nonpayment? A. Yes, sir.

Q. Those checks, were they in amount in 1926, say along after April 26, 1926 to and including, for all I know, down to January 1, or along in that time?

A. You mean did we have any one account where checks were returned more than any others?

Q. Yes, and which you learned about from any source?

A. Well, of course naturally if any large checks were returned on any account, they would be brought to some officer's attention.

Q. Well in 1926 from April 26th on did you ever hear of an institution by the name of the McCormick Lumber Company? A. Yes, sir.

Q. Did you ever ascertain or know as an officer of that Bank during the period from sometime around about June, 1926, progressing along later,

(Testimony of L. B. Menefee.)

any of these checks that were being returned were checks in any large quantity? [430—100]

A. Yes, sir.

Q. Unpaid? A. Yes, sir.

Q. Who did you learn that from?

A. Well, it was a matter of common knowledge.

Q. How general was that knowledge; when you say common; I mean was it known to all of you men in the Bank?

A. I don't think there was anybody in the Bank that didn't know it.

Q. Now, can you fix as near as possible the time when you first learned that checks of the McCormick Lumber Company were being returned unpaid, as near as you can fix it, if you can fix it?

A. Well, I would say it was practically from the time the account was opened.

COURT.—When was the account opened, do you remember?

A. No, I do not, Judge." (R., 402, 403, 404.)

The witness was then shown ledger sheets to refresh his recollection, and identified the account as being opened with the Bank March 29, 1926, by McCormick Lumber Company and that the check items on that account continued to come back more or less during the entire time, up to and including 1927, and that that fact would have been susceptible of ascertaining by anyone who had to do with the Bank's affairs and that it was generally known in and around the Bank, and on these ledger sheets were the letters "O. D." indicating overdrafts, and

(Testimony of L. B. Menefee.)

that would be on the Bank's records at the time of closing of individual ledger sheets each day.

"Q. Tell me now whether it was large or small?

A. The ledger sheets themselves would indicate that it was large.

Q. The ledger sheets would indicate what?

A. Large.

Q. Could you say—

A. What did you have reference to were large or small—was that items going through the account or overdrafts?

Q. The overdraft—no I meant the checks that went through.

A. You mean different transactions in the account over a period of that time?

Q. Yes. A. Large." (R., 406.) [431—101]

Thereupon, the original McCormick sheets were compared with the photostatic copies, and they were offered in evidence and marked "Complainant's Exhibit 2."

The witness then testified by question and answer as follows: [432—101-a]

"Q. Did you and any other officer of the Bank have any conversation about this account and these checks during the period that they were being handled? A. Yes, sir.

Q. On that subject?

A. Well, it was a matter of more or less concern, and discussed among all of us.

Q. That included everybody?

A. As far as I know.

(Testimony of L. B. Menefee.)

Q. If you conversed first, or somebody conversed with you, who was it and about what time?

COURT.—You mean executive officer or employees?

Q. Executive officer if he knows. Whoever it was. I haven't the least notion yet. I am trying to find out as fast as I can.

A. Judge, let me say that this account was large and a matter of concern in the organization, and it was like in any other concern, it was a matter of conversation among us.

COURT.—Among whom?

A. All of us. Now, I would not want to say that I talked with one man. My opinion is it was talked by all of us. Now, if I say that I talked with Mr. Price, or Mr. Stewart or Mr. Skinner, I might be doing somebody an injustice, but my remembrance is it was all of us.

Q. In other words, it was so generally known that Mr. Price himself knew it?

A. That would be my opinion.

Mr. HART.—Just one moment.

Q. I don't want your opinion.

Mr. HART.—The question should not be put in that form undertaking to quote or interpret the answer of the witness.

Mr. BRISTOL.—Your Honor quite well understands if there was any such insinuation to my question it was unintentional and I don't think it had that.

Q. Were the talks and conditions such that when

(Testimony of L. B. Menefee.)

you say everybody knew it, you meant to include in everybody knowing it, all the officers of the Bank?

A. Yes, sir.

Q. Now, in order to obviate the word officer purely as such, did that include the Chairman of the Board, Mr. Price? What do you say?

A. I just explained that I didn't want to say that I had talked with Mr. Price or Mr. Skinner or Mr. Stewart by name, because I might be doing them an injustice, but I believe it was talked by all of us.

Q. Did you and Mr. Bates ever have any talk about it?

A. I don't think there is any question about that.

COURT.—What position was Bates in the Bank?

A. Cashier.

Q. Bates was cashier, was he not? A. Yes, sir.

Q. And were you ever present at any time or place where—or in your hearing—where Mr. Bates, during that period discussed it with any other officer of the bank, as cashier?

A. Discussed the overdraft now?

Q. Yes, and the condition in this bank of the McCormick account during that time? [433—102]

"A. Well, I think I would answer yes to that.

COURT.—Who was the other officer of the Bank that was present when Bates talked?

A. Well, Judge, there wasn't any reason for me to charge my memory.

(Testimony of L. B. Menefee.)

COURT.—If you don't know, of course say so; that is quite important in this case.

Q. Well, were these talks frequent between you and Mr. Bates in the presence of other officers of the Bank—I will withdraw that and put it this way: like Mr. Skinner, and like Mr. Stewart and like Mr. Olmstead, and like Mr. Price, if at all?

A. I could answer that in a different way, Judge.

Q. Answer in your own way; give me the facts; that is what I want.

A. Here is the way the overdrafts were handled: If an account became overdrawn, before we refused to pay it, the bookkeeper would refer the item to an officer of the bank, and ordinarily if the item was referred to any one of us officers, we used our own judgment in whether or not we paid it, but if it was an item against an account of an important customer, we conferred before we turned it down or paid it, and so naturally this account, being a rather large account, before any action was taken on the checks there would be a conference as to what was to be done.

COURT.—Conference with whom?

A. Well, I presume that if—

COURT.—No, no, if you don't know—if you know anyone you conferred with give the name; if not we will have to take your general statement for it.

A. Well, if the items were presented to me by the bookkeeper I would take them up with Mr. Skinner, Mr. Stewart or Mr. Olmstead—whoever happened to be most convenient at the time.

(Testimony of L. B. Menefee.)

Mr. LOGAN.—That answer is not responsive.

COURT.—Were most of these checks that were returned unpaid taken up with you?

A. That would be an overdraft.

COURT.—I know it would be; we will call it an overdraft then.

Mr. HART.—That is just the point. He is confused as to what an overdraft is.

COURT.—I understand these checks, when they were deposited at the bank were accepted for immediate credit.

A. Well, that isn't the question he asked me. He is asking now with reference to this overdraft at the side of the individual ledger, which indicates the account was overdrawn at the time.

COURT.—Oh, has no reference to checks?

A. It would be occasioned by a check being presented which had been drawn against that account in our institution.

COURT.—That wouldn't have any reference to out of town checks?

A. No, absolutely not.

Mr. LOGAN.—That is why I thought your answer was not responsive.

Q. Now, Mr. Longshore, state whether or not you were one of the trustees of the Dufur Farm & Fruit Company? A. I believe I was. [434—104]

Q. And did you continue such trustee up to the time the bank stopped? A. As far as I know.

Q. And do you know whether Mr. Bates or Mr. Edgar Sensenich had anything to do in some capa-

(Testimony of L. B. Menefee.)

city as trustee of that Dufur Farm & Fruit Company? I believe your relation was with respect to a $75,000 mortgage some time in 1923, wasn't it?

A. Well, I don't know very much about that.

Q. In which you and Water Brown were trustees, the same Mr. Brown you mentioned before.

A. I was a rubber stamp trustee, and I don't know very much about that proposition.

Q. Do you recall who it was that asked you to become trustee?

A. I think it was Mr. James B. Kerr that gave me the paper and told me to sign my name to that.

Q. Do you know how it came about that Mr. Sensenich and Mr. Frank O. Bates were trustees a day or so afterwards for a $150,000 mortgage of the Dufur Farm & Fruit Company?

A. I presume it was the same way.

Q. Did Mr. Hoyt, George W. Hoyt, I think you said, who was in this other department with Mr. Brown, until Mr. Brown came over to your side, ever give you any information, or have any talk with you or you with him, concerning returned checks of the McCormick Lumber Company in 1926?

A. I am not sure whether it was checks or acceptances.

Q. Well, any kind of paper that went through the bank somehow and was not paid when it came, concerning the McCormick Lumber Company and/or Wheeler, or anybody else?

(Testimony of L. B. Menefee.)

A. Well, my remembrance would be that Mr. Hoyt talked to me, yes, sir.

Q. Talked to you? A. Yes, sir.

Q. Do you know or remember when he first mentioned it to you? A. No, sir.

Q. Can you say whether it was early or late in 1926? A. No, sir.

Q. You recall definitely, however, that he did have such a talk with you? A. Yes, sir.

Q. To whom, if at all, then, did you impart that information? A. Nobody.

Q. At that time? A. Any time.

Q. Was there anything to prevent any officer, or any official during that period in 1926 that we have been talking about, from ascertaining and knowing just as much as you ascertained and knew about the McCormick transaction?

A. There was nothing to prevent them from knowing?

Q. Yes. A. No. (R., 480, 409, 410, 411, 412.) [435—104]

On cross-examination, this witness testified upon question and answer as follows:

"Q. Oh, I am not following any theory. If you can give us an idea of what it would mean to examine thirty thousand accounts, you may do so, otherwise all right.

A. Take considerable length of time.

Q. You said in response to a question that the condition of the bank, the condition of the bank's affairs, was ascertainable at any time by the Exam-

(Testimony of L. B. Menefee.)

ining Committee, or by any director, and I assume you would make the same answer if I asked you if the condition of the bank was plainly ascertainable by the federal bank examiner?

A. It should be more readily.

Q. You would expect a bank examiner to be better able to ascertain the status of affairs of the bank than the Examining Committee, wouldn't you? A. I would, certainly.

Q. The federal bank examiner is an officer whose sole duty is to make examinations of that kind, isn't it? A. Yes, sir.

Q. This city is in the twelfth federal district, is it? A. I believe so.

A. And there is a chief examiner at San Francisco, named Harris? A. There was.

Q. And other work under him in this northwest region, too? A. Yes, sir.

Q. Now, do you know whether Mr. Harris himself made any examination of this bank in September, 1926?

A. Well, that is a matter of record. I think he did.

Q. And what can you say as to the thoroughness of that examination?

A. I couldn't say anything regarding it.

Q. Do you know whether Mr. Harris ascertained that there were many McCormick Lumber Company checks deposited for immediate credit, and later returned unpaid?

A. If he didn't he should have.

(Testimony of L. B. Menefee.)

Q. I didn't ask you that; I asked you if he did.

A. I had no conversation with Mr. Harris at any time, one way or the other.

Q. When this examination was made by Mr. Haris in the fall of 1926, did you inform Mr. Harris of the fact that there were McCormick Lumber Company checks returned unpaid? A. No.

Q. You took no steps whatsoever to bring that fact to the attention of Mr. Harris?

A. Why should I?

Q. Did you take any steps at any time to bring the fact about these returned checks, to the attention of the Examining Committee? A. No, sir.

Q. You testified in the criminal case, United States vs. Olmstead and Wheeler, didn't you?

A. Yes, sir. [436—105]

Q. And you testified there that it was probably in July or August, 1926, but that it might have been September, that you first learned that checks of the McCormick Lumber Company were being returned unpaid by the drawee banks. Is that your present recollection, or did you mean in direct examination here that you learned of it at an earlier date?

A. Pardon me, I thought I said I didn't remember the exact date.

Q. I will be glad to give you what the transcript shows on that. Your attention, you testified, was drawn to this situation by Mr. Bates, and you were asked the question, 'Do you know when this was that you saw this first list that you have detailed

(Testimony of L. B. Menefee.)

here?' That referred to a list of checks which had come back. A. Yes, sir.

Q. And you testified, 'No, I don't; there wasn't any reason why I should charge my memory, but I judge that it was probably July or August, 1926, although I am not positive; it might have been September.'

Mr. BRISTOL.—This is with respect to a list Bates had, not as to his general knowledge.

"Q. Is that testimony substantially as you recall it?

A. Yes, if I understand you right, I don't remember when those items first started to come back. I think I made the statement here this afternoon that they probably started soon after the account was opened; but I don't say that they did.

Q. I don't know whether you meant to say that your attention was called to the fact that checks were coming back—your attention was called to this fact?

A. Yes. That doesn't have anything to do with that list.

Q. This list was the first time the matter was forcibly brought to your attention. Isn't that correct? Isn't that the very thing you said in the other case? A. I don't know.

Q. Is that the truth? I will put it this way: Was this matter of the return of checks brought to your attention in a way that impressed you to any extent, by Mr. Bates showing you a list of checks in July, or August, or September?

(Testimony of L. B. Menefee.)

A. Well, now, maybe we can kind of get together a little bit. When these checks first started to come back they probably came back one or two at a time. When Mr. Bates kept his list they amounted to quite a considerable sum.

Q. Yes. And is that the first time that the matter was brought, as you said in the other case, forcibly to your attention?

A. Yes, the items were coming back in large amounts.

Q. And you said in the other case, according to the transcript, that at one time or another the matter was brought to your attention by Mr. Fraley, Mr. Hoyt, Mr. Bates, Mr. Brown, and Mr. Jones.

A. Well, I say was brought to my attention, or was discussed; it doesn't make any difference. [437—106]

Q. Says was brought to your attention. And then didn't you say in answer to the question: 'Now, what about the senior employees?' and the answer is, 'My impression is that it was discussed in my presence by them, but I don't feel that I would be justified in testifying to that effect, because I understand that they have testified that they didn't talk about it.' A. Yes, sir.

Q. These checks of the McCormick Lumber Company, when they came back unpaid by the drawee banks, I understand were not charged back against the McCormick Lumber Company account, so as to create an overdraft, were they?

(Testimony of L. B. Menefee.)

A. They might have been originally, they were not laterally.

Q. Well, the practice that prevailed was not to charge the item back if the customer didn't have a balance to take up the charge. Wasn't that the practice that prevailed in the Bank at that time?

A. Well, I don't know whether you are exactly right there, or not. If we had a check drawn against the 'Oregonian,' we would have charged it back probably, regardless of whether they had any funds or not, unless that was a special account that we were handling, and they had requested us not to charge items back, but to take them *over them,* and they would take them up.

Q. Then, in the case of an account which had a large balance in account, where you knew—

A. Where we relied on them to take the item up immediately.

Q. Where you knew the customer would at once take care of the item? A. Yes, sir.

Q. Then you would charge it back?

A. Yes, sir.

Q. And notify the customer of the return of the check? A. Yes, sir.

Q. And in the case of the McCormick Lumber Company, if the practice ever did prevail of charging back items at once, that was soon discontinued?

A. Well, maybe not soon, but it was discontinued.

Q. So that on the face of the statement there would be no overdraft shown as the result of the return of these checks?

(Testimony of L. B. Menefee.)

A. That is my understanding.

Q. Now, you know—at the time you knew that their new checks were constantly being deposited to take care of those which came back unpaid?

A. Yes, sir.

Q. And then presently you would have information that some more checks had been returned unpaid, and presently other new checks would be deposited to take care of those returned checks? That is what you meant was known by you during the summer and fall, and winter, of 1926?

A. Yes, subsequent to the time it was first called to my attention. I can't identify that particular time.

Q. You didn't undertake, did you, to trace any particular check to see whether that one eventually was paid, or whether it came back?

A. I had no contact with the account whatsoever. [438—107]

Q. And you didn't undertake then to ascertain how much of the newly deposited checks were good checks or how much were like the ones whose place they took?

A. I had nothing to do with the account.

Q. You only knew that a large volume of checks was passing through, and you assumed that some of them each time were not good checks, because—

A. Well, not necessarily each time, but there was checks coming back continuously.

Q. What assurance, if any, did you either receive

(Testimony of L. B. Menefee.)

or hear about after the manner of taking care of these unpaid checks?

A. Just how was that?

Q. Perhaps that is a little bit vague. Is it a fact that when this matter was discussed, as you say it was discussed, that all understood that the president of the Bank either had secured or was securing adequate protection from J. E. Wheeler, to take care of these checks?

A. I wouldn't say that I had any knowledge of that.

Q. Did you know that this particular account was in the personal charge of the president of the Bank?

A. Yes, sir.

Q. And was that fact known and understood by all the junior employees? A. Yes, sir.

Q. And is it a fact that all of the developments in this account were referred by the junior employees to the president of the Bank directly—I will change that—either directly, or through Mr. Bates, the cashier?

A. Well, I don't know as I would want to quite go that far, but I will say that he was kept in touch with the situation of the account at all times.

Q. Is that the reason that you yourself never felt called upon to do anything about this matter?

A. No.

Q. The reason, then, I take it, is that you thought it was outside of your duties?

A. No, not necessarily that, either. Do you want me to tell you why I didn't?

(Testimony of L. B. Menefee.)

Q. I have asked you.

A. I didn't understand you asked me that question. When this matter was brought up from time to time for discussion, particularly when you would discuss this list, that meant a large account, and Bates came to me very much perturbed, and I asked him immediately if Mr. Skinner knew it; and he said yes, he had taken it up with him; and subsequently when he came to me with his list I would ask him the same question, if the other senior officers of the Bank had been apprised, and he would tell me yes; and I thought if he had taken it up with them I didn't see any reason why I should.

Q. He didn't tell you which senior officers, except he told you Mr. Skinner, once?

A. My remembrance would be that he told me right along that he had taken the matter up with Mr. Skinner. That is my best memory.

Q. You just told us that you understand, and all understood, that this whole McCormick Lumber Company matter was in the personal charge of the president. Now you say Mr. Bates told you he took it up with Mr. Skinner?

A. Yes. [439—108]

Q. Did he ever tell you he took it up with Mr. Olmstead?

A. That wasn't necessary for him to tell me, because I have seen him a number of times take it up with Mr. Olmstead; you might say daily.

Q. Do you know, who it was among the senior of-

(Testimony of L. B. Menefee.)

ficers who O. K.'ed these checks so they were entitled to immediate credit?

A. Well, what period are you speaking of now?

Q. I am speaking of the period from 1926—from March, 1926, to the end. What officer was it who approved or O. K.'ed the checks of the McCormick Lumber Company, so that the bank gave the McCormick Lumber Company immediate credit for them?

A. Are those checks in evidence? Are those checks here?

Q. No. Well, you know. You know they were all O. K.'ed by Mr. Olmstead, don't you?

A. No, I don't know that.

Q. Were those checks exhibited to you in the course of the criminal trial? A. No, sir.

Q. You have never seen them?

A. I saw them up here on a board, but I never went over them myself, no.

Q. By whom were the checks you saw, O. K.'ed?

A. You mean in this criminal trial?

Q. Yes.

A. I don't remember. Did I see them?

Q. You just said you had them before you.

A. No, no, I didn't. I said they were up here before another witness.

Q. Did these customers' ledger sheets, such as Exhibit 2, in evidence—where the word "OD" appears opposite an item, I take it that that does not mean that at the close of business that day there was an overdraft in that customer's account?

(Testimony of L. B. Menefee.)

A. Not necessarily.

Q. The entries would be posted up at the end of the day's business, and then it would be determined whether or not there was any overdraft in that account.

A. I think the mechanics are this: As the posting is continued during the day, if check should come in *the* preceding a deposit, then that "OD" would show at the side of the column; later in the day, if deposits came in, then that would make the account all right at the close of that day's business.

Q. So that the initials "OD" appearing at different places in the customer's ledger, didn't necessarily mean that at the close of business on any day that there was an overdraft in that customer's account?

A. Not unless it shows at the close of business.

Q. And whenever there was such an overdraft at the close of the business, then that fact would be listed in an overdraft statement, or an overdraft book? A. Yes, sir.

Q. And anyone examining the affairs of the Bank that particular day would go to that overdraft book to ascertain what overdrafts were made?

A. Yes, sir. [440—109]

Q. And, as you explained a minute ago, the return of unpaid checks which had theretofore been credited to the depositor, would not create an overdraft unless they were charged back to the customer's account? A. Yes, sir.

(Testimony of L. B. Menefee.)

Q. Did you, Mr. Longshore, find out about the passing through of these McCormick checks by your own investigations, or did you find it out because some other employee of the Bank told you about it?

A. Well, it would have to be referred to me, because I had no connection with the account.

Q. You can answer that question quite directly. Did you find it out by personal investigation, or was it told you by some other officer, or some other employee?

A. Do you mean before I had any knowledge of this proposition, that I went to their ledger, or to the transit department, and made a check?

Q. Yes. A. No, absolutely not.

Q. No one told you that there was something to look up, whereupon you went and looked it up?

A. No.

Q. That wasn't it, was it?

A. Not to the best of my knowledge.

Redirect Examination.

(Questions by Mr. BRISTOL.)

Not having gone and made a special trip to look it up, anybody else there in that Bank was in the same position of general knowledge as you *you* were, with that thing, as far as you know?

A. Why, yes, I should think so." (415–16–17–18–19–20–21–22–23–24–25.)

Upon question and answer the witness further testified as follows:

(Testimony of L. B. Menefee.)

Q. Now, about the thirty-three thousand accounts. If thirty-three thousand accounts, or any other number of accounts in the Bank, were to be examined by somebody—if somebody had to do it, it is not impossible, is it? A. No.

Q. It is only a question of time, isn't it?

A. It isn't done.

Q. I beg your pardon? A. It isn't done.

Q. It isn't done; but I say if it became necessary to do it, it could be done, couldn't it?

A. Yes, sir.

Q. Now, no Examiner, even a regular Bank Examiner, examines all the customers' accounts in the Bank, does he? A. No, sir.

Q. To find out its condition?

A. No, sir. (R., 427, 428.) [441—110]

* * * * * * * * * * *

Q. Did you discuss it, or did he say to you how much the checks then amounted to at that time, when Bates did show you this list?

A. My rememberance is, yes, he did.

Q. And do you recall what amount he said?

A. No, sir.

Q. Either from the list, or by list separate therefrom? A. I do not.

Q. But you are convinced that Mr. Bates did so state? A. Yes, sir.

Q. Would it be your recollection that that was over any specific sum of money, small or great? Did it run into the hundreds of thousands, or was it

(Testimony of L. B. Menefee.)

down into the ten thousands, or do you have any recollection at all?

A. My recollection is it was in excess of a hundred thousand dollars.

Q. In excess of a hundred thousand dollars, on this list Bates showed you in July or August, 1926?

A. When the list was first called to my mind, we more or less identified it with July or August, I didn't say it was.

Q. When you testified in the criminal case, in the matter that Mr. Hart was talking about, was any list that Bates showed you presented to you then, when you were a witness in the criminal case?

A. No, I think not." (R., 429.)

By the statement that an account was in the personal charge of the president, witness meant, to illustrate, that when an employee from the "Telegram" would come in to make a deposit the item would be taken to Mr. Olmstead to be O. K.'ed. The junior officers had instructions not to take any items for the Wheeler in the name of the McCormick Lumber Company unless O. K.'d by a senior officer of the Bank. Mr. Skinner and Mr. Stewart would not O. K. them so they had to go to Mr. Olmstead.

The junior officers always looked to Mr. Olmstead for their instructions and in his absence to the senior vice-president. Other officers had authority to O. K. checks.

Upon question and answer, the witness testified: [442—111]

(Testimony of L. B. Menefee.)

Q. I say, don't you know that there were other officers in that Bank who had authority to O. K. checks in such instances? A. Absolutely.

A. And that those officers had as much right to exercise that authority to O. K. such checks, as Olmstead had? A. I think so.

Q. Now, then, do you undertake to say that during this period, say from March 29, 1926, to March, 1927, that Olmstead was *alway* there so that it would never come to any other officer to O. K. a check of the McCormick Lumber Company on an outside Bank, or any other transaction with your Bank?

A. No, he wasn't always there. (R., 434.)

The witness then testified that withdrawals had become noticeable along about the first of February, 1927, and that rumors had existed before that time concerning the condition of the Bank. [443—111–a]

Thereupon the witness was asked the following questions and gave the following answers, and the evidence shows:

"Q. And so, from the first of February, down to the time that the crisis took place, I am to understand that you knew that the savings deposits were being gradually withdrawn in volume, and that you knew nothing that the directors did in that Bank about it, or about your then financial condition?

A. Well, if I understand your question, what could they do?

(Testimony of L. B. Menefee.)

Q. Very well, we will leave it then. Are you familiar with clearing-house practices?

A. Not in detail.

Q. I beg your pardon? A. Not in detail.

Q. Well, there was a clearing-house in the city of Portland, wasn't there? A. Yes, sir.

Q. And also a Federal Reserve Bank?

A. Yes, sir.

Q. Now, isn't it true or don't you know, with respect to what could be done, that if people have sufficient current assets in the Bank, that they can go to the clearing-house and to their Federal Reserve Bank, and get money when a crisis reaches them, if conditions are such. Don't you know that, as a banker?

COURT.—No question about that.

Mr. HART.—Of course, if they had the assets, as the Court said.

Mr. BRISTOL.—If you gentlemen concede there was an opportunity to do something.

Mr. HART.—We make no admission for the record.

Mr. BRISTOL.—Or making a side remark. I asked the witness a question, and the Court said it was self-evident.

Q. Do you know whether or not anything was done by the board of directors in the month of February or March, 1927, to enable the Northwestern National Bank to continue in business, and conduct itself as a Bank, as you saw it there, prior to the

(Testimony of L. B. Menefee.)

time it shut down, and if so, what did they do, if you know?

A. They gave the matter every consideration, but they didn't discuss it with me.

Q. Well, how do you know they gave it every consideration?

A. You can tell what is going on around an office; the meetings that took place, and one thing and another.

Q. I asked you a while ago about that, and you said you didn't understand my question. Now what did they do?

A. You said you could tell by what was going on around the place. Now, what did they do?

Q. I didn't meet with them; I couldn't know what they did unless I did meet with them. [444—112]

Q. Then why do you *profer* that they did everything they could do? That is what I want to find out, what did they do.

A. Well, I think there is something that you know, that you can't explain.

Q. Do you know anything about what the directors did? A. No, sir.

Q. Is there anything about what any director did, that you know, that you cannot explain?

A. Oh, I don't just follow you now. What do you mean by that?

Q. I took your own words; I don't think there is anything very mysterious about it. You were right there in the Bank, weren't you?

(Testimony of L. B. Menefee.)

A. Surely.

Q. Now, it is a simple thing to tell us, if you know, in those days, as you fix it, when your savings accounts commenced to be withdrawn, and you say gradually increased withdrawals until finally it came to the day of the bank's closing—now it is a simple thing, if you know: I asked you what was being done by the directors?

A. I don't know." (R., 437, 438, 439.)

On redirect examination this witness testified that customers came into the Bank along about the first of February with rumors that the Bank was not safe and that they had heard the Bank was going to close its doors, some before and some after the first of February. Apparently these rumors were based upon what somebody had told somebody else, that the Bank was not safe and that it had losses sufficient to worry depositors, and that witness noticed that this was conversation which came not only to him direct, but to other officers of the Bank, and he thought it came to all of them, and commenced as early with the other officers as it did with him. That it was rumored on the street that there was a sale of the Bank pending, that he did not hear that officially from anybody in the Bank, but that they all had heard it, in a sort of grapevine way; that the first time he heard of a sale was in 1923, the same sale that Mr. Ainsworth had talked about, but that he had heard by rumor both inside and outside of the Bank, with regard

(Testimony of L. B. Menefee.)

[445—113] to the period about January 1, 1927, to March 28, 1927, that the bank was to be sold; that his fellow officers had discussed it with him after the first of the year, notably Mr. Bates, the cashier, and also Brown and Hoyt, and this was first a rumor that it was to be sold to the United States National and then there was a rumor that it was to be sold to the First National.

That the rumors at any rate that the witness had heard came before the alleged discovery of the Bank officers of the float, and before the change in presidents on March 1, 1927, but were aggravated afterwards.

Then as part of the evidence, it was stipulated that in addition to the compensation received as directors, the following sums were by the Bank paid to the members of the Examining Committee at the times set forth, to wit:

"Originally, in May, 1921, to Messrs. Kelley, Charlton, and Metscham, $150.00 each; in December, 1921, Kelly, Charlton and Metschan, $225.00 each; in February, 1922, to the members of the examining committee, $175.00 each; November 3, 1922, $200.00 each; August, 1923, $200.00 each, making $600.00 for the three members. December, 1923, when Mr. Spalding, Mr. Metschan and Mr. Charlton were on the Board, $200.00 each; and in March, 1924, Mr. Metschan, Mr. Spalding and Mr. Charlton, $200.00 each. October, 1924, same names, $200.00 each; May 10, 1925, and between that and May 28th some time $200.00 each; December, 1925,

(Testimony of L. B. Menefee.)

same amount each, and same members. May 6, 1926, and between that time and the 20th of May, $200.00 each, same members. November 26, 1926, payment as of December 9, 1926, same members, $200.00 each, $600.00." (R., 446.)

TESTIMONY OF E. H. COLLIS, FOR COMPLAINANTS.

It was proved by the witness E. H. COLLIS that the Ballin stock was first paid for July 11, 1918, for 100 shares at $125.00 per share, or $12,500.00, and in July, 1922, for 100 shares at $150.00 per share, or $15,000.00. [446—114]

TESTIMONY OF GEORGE C. WATKINS, FOR COMPLAINANTS.

Then appeared GEORGE C. WATKINS, on January 7, 1927, who had represented Spaulding Pulp & Paper Company and who stated that he had approached the witness concerning the Ballin stock and wrote a letter to the witness accordingly. That witness forwarded the letter to Ballin to which Ballin made some answer direct.

Thereupon the witness last referred to in the Collis testimony was called to the stand and shown the letter written to Collis, and acknowledged that he received the reply to the letter, from Ballin; the original reply was identified and the letter offered in evidence and marked Complainant's Exhibit 4.

(Testimony of George C. Watkins.)

Thereupon another letter was offered in evidence, and marked as Complainant's Exhibit 5.

That the witness had asked Mr. Spaulding if he was interested in the purchase of the stock, and Spaulding replied that he was not. This arose from the witness' connection with the Spaulding Pulp and Paper Company.

Upon cross-examination it was brought out from this witness that in the sale of the securities to the Spaulding Pulp & Paper Company, he made trades for other stock and securities of the Paper Company's stock; that his principal business at that time was the selling of securities of the Spaulding Pulp & Paper Company.

TESTIMONY OF FRED BALLIN, FOR COMPLAINANTS.

Thereupon, BALLIN, one of the complainants, testified that he was a resident of Los Angeles, California, and that on January 28, 1927, he had occasion to communicate with Emery Olmstead regarding a letter which he had received from Olmstead asking him to withdraw his stock from the market. [447—115]

That he had transmitted all of the correspondence between Collis and Watkins about the Spaulding suggestion made by Watkins, and about the Collis suggestion made from Watkins, to Olmstead.

Thereupon Complainant's Exhibits 6, 7 and 8 were introduced in evidence, also there was intro-

(Testimony of Fred Ballin.)

duced in evidence a telegram from O. L. Price, dated March 26, 1927, addressed to Ballin, which Mr. Ballin identified as having been received from Mr. Price, one of the defendants. The same was received in evidence of complainant as Exhibit 10.

That Emery Olmstead and John Twohy had submitted a paper writing which bore his signature for 200 shares, that followed the March 26, 1927, suggestion of the telegram and letter. Thereupon Complainant's Exhibits 11 and 12 were received in evidence; and it appeared in the letter written by Olmstead, president of the Bank, that he stated, "I am considering the offer of sale you made as an option and will keep you advised of anything that takes place, and will of course protect your interest." Thereupon Olmstead sent him a telegram, which was received in evidence as Complainant's Exhibit 13, and thereupon there was offered in evidence as Complainant's Exhibit 14 the letter of Francis P. Graves concerning the 200 shares of Northwestern National Bank stock in the name of Fred Ballin.

The witness Ballin was then shown the Bank stock and certificates of its endorsement and pledge as collateral on some stock transactions that Ballin had had with Graves & Company. Thereupon the witness produced the written statement of Graves & Company with regard to that transaction by way of letter dated [448—116] January 3, 1927, and the same was offered in evidence as Complainant's Exhibit 15.

(Testimony of Fred Ballin.)

That the witness had been trading with Graves & Co. and that Graves & Company had simply taken this stock at the suggestion of their Bank and had it transferred; that it was Ballin's stock and Olmstead had informed him that Graves & Co. had had the stock transferred in their name; that he had never given any proxy to Graves & Company to vote his stock at the meeting of January 11, 1927, and that he never got any notice from Graves & Co. that they were voting his *stock any* meeting of the Bank with his consent or in any other way. Thereupon certificates were marked to show when Graves & Company released their ownership of this stock, and some were accepted in evidence as Complainant's Exhibits 16 and 16–A; that the witness learned of the transfer of the stock by Graves & Co. from Mr. Olmstead in 1926, after it was done.

That witness had frequently talked to the directors of the Bank from time to time as he was in and out of the Bank, for six or seven years while he was in Portland and while he was in the office of Olmstead, and as he would meet the different directors, and they all would tell him that the condition of the Bank was excellent; that he never had any information contrary to what was given out in the printed reports, from Mr. Olmstead or anyone else; that he was not called on in 1927 to contribute any money to the Bank, and no one had ever asked him to put up any money in 1925; that, in fact, from 1923 on down to the end, he was always assured that the Bank was in good condi-

(Testimony of Fred Ballin.)

tion; that in 1926 Mr. Olmstead told him that he had a reorganization planned by which the company would subscribe [449—117] and take over the frozen assets of the Bank, and that he would try to reorganize the Bank into a state institution; that all of the directors had agreed to that, and for him, Ballin, not to worry and not to try to sell his stock, that it was all right and that he (Olmstead) could get him full value for it. (486) That Olmstead had taken an option on his stock in March, 1925, and that was the same stock that was referred to in the letters of 1927.

Thereupon was offered in evidence Complainant's Exhibits 21 and 26 inclusive, being the oaths of office certified to by the Comptroller for the directors for the years 1922, 1923, 1924, 1925, 1926, 1927. (R.,490.)

TESTIMONY OF —— DECKER, FOR COMPLAINANTS.

DECKER, who worked in the collection department in 1926, heard of collection items on account of the McCormick Lumber Company; that they commenced shortly after 1925, and some of these items came back every two or three days, and they would be thrown into Cash Items, and the witness noticed that they were increasing and there were some of these McCormick Lumber Company checks in the Cash Items before the account was opened March 29, 1926; thereupon, the following colloquy took place between the Court and the witness:

(Testimony of —— Decker.)

"COURT.—And taken up when the account was opened?

A. Yes, sir.

Q. You say they were taken out of that account?

A. Taken out of Cash Items.

COURT.—When that account was opened some of the McCormick checks were taken out of the Bank?

A. They were charged back to this account.

COURT.—No, the Bank Examiner reported certain Cash Items, McCormick Lumber Company checks, as Cash Items, as I remember the testimony.

A. Yes, that is right.

COURT.—And when this account was opened they were taken up.

A. They were charged back to this account.

Q. They were charged back in there, as far as the Bank records are concerned, when you got a check of that character they went back into that thing so that there was some record kept of it, wasn't there?

A. This is the record right here. [450—118]

Q. That is what I thought; that is what I tried to tell the Court before.

A. These debits—a good many of these debits on the debit side of the ledger, are not checks of the McCormick Lumber Company on us, but charge back items.

COURT.—They were items that were carried as Cash Items prior to the time that this was opened?

A. Yes, sir, that is right.

(Testimony of —— Decker.)

Q. And these sheets exhibit then, a series of these particular transactions as they grew from time to time after that account was started in March, 1926?

A. Yes, sir." (R., 494, 495.)

That these items so carried in the account were large in the summer of 1926 and that he knew, from approximating the amounts that they were large, but that he did not have them all at one time until 1927; that he always referred the items to George Hoyt, the assistant manager in the department, and that he knew all about them. Mr. Hoyt was his superior officer, and that Mr. Fraley, the assistant cashier and auditor, had been around the department in respect to these items in 1926 about once in every two weeks in the latter half of the year; that he had informed Mr. Fraley when he would have these Cash Items representing checks that came back unpaid, and Fraley came into the department and had taken the items himself to look them over and that if the items were running in large amounts in the collection department unpaid, they would be shown in the Bank's condition when made up as Cash Items and should have been carried as Cash Items, and the Cash Items were the ones spoken of in 1926 and '27; that they had to be carried in the Bank's assets somewhere, and it was carried in the collection department each night.

Thereupon the Court asked the following question of the witness Decker, and his answers were: [451—119]

(Testimony of —— Decker.)

"COURT.—Do you make a distinction between Cash Items and items for collection?

A. Cash Items are part of the bank's assets; and items for collection have not been paid yet, no credit has been given on them, and they are not the Bank's assets.

COURT.—I have not been through this for a week or ten days on the criminal case.

A. The collection items don't show on the bank statement at all.

Q. A customer might put in a check for collection, and that does not appear in the Bank. Is that what you mean?

A. That is it; that does not show on the bank's statement.

Q. Does not show on the bank's statement at all?

A. No, sir.

Q. When you want to find a record of what that bank had, in order to get the cash right, you had to have the total of your cash represented by the collection, didn't you? A. Yes, Cash Items.

Q. Represented by collections?

A. Represented by Cash Items, not collections.

Q. Yes, represented by Cash Items. I don't want to get those two things mixed; would be right in the collection department; these things called Cash Items, that you had returned, you had to make some statement of it; how do you do that?

A. The Cash Items. It is necessary to get a total, a correct total of Cash Items; I think that

(Testimony of —— Decker.)

is what you mean—to balance the day's work in the bank.

Q. Yes. A. Yes.

Q. Suppose we take a large amount, $100,000 or more—what I want to know, if you can tell me from your knowledge—if there had been like yesterday so-called Cash Items gone out, that represent that $100,000, and they come back today $100,000 unpaid, how would that be handled in your records so that the other bank people would make the entries in their books? A. We simply listed.

Q. What? A. Made a list of it.

Q. Do you know anything about a list sometime in July somewhere that was up there or shown to anybody? A. 1926?

Q. Yes. A. July, 1926?

Q. Yes. A. List that was there?

Q. Shown to anybody; list of these Cash Items that were shown to anybody?

A. Someone in particular; out of our department?

Q. Yes, in the bank.

A. Well, I always showed them to Mr. Hoyt, and I also told Mr. Olmstead when any items came back.

Q. How often did you tell Olmstead that items came back?

Mr. HART.—You are referring now particularly to these McCormick items? [452—120]

A. Yes.

Q. How often did you tell him one came back?

A. Whenever one came back into the department.

(Testimony of —— Decker.)

Q. How often was that, then?

A. Every day, or two, or three, or four. Sometimes would miss two or three days: twice a week at least.

Q. You must have some idea left yet in your mind that approaches the fact of about what that all amounted to, haven't you?

A. I know what it amounted to in 1927, when they accumulated in the Cash Items.

Q. What did it amount to then?

COURT.—The float, you are referring to now?

A. Yes. Close to $800,000.00. That is the only time they were all in there at one time, so that is the only time I knew exactly how many there were.

Q. Did that result as a calculation by taking the difference between the debit and credit side of the account, of what had been sent out, and what had been returned?

A. No, those were all returned items.

Q. Those were all absolutely net returned items?

A. Returned unpaid.

Q. How much was that in 1926, in the fall?

A. Fall of 1926?

Q. Yes, if you know.

A. Of course I don't know, but it was probably somewhat less than that in the fall of 1926." (R., 500, 501, 502.)

Thereupon the following question was asked and the witness testified:

"Q. Did you ever make out a sheet—we were told something here about a sheet that was ex-

(Testimony of —— Decker.)

hibited to Mr. Frank O. Bates, cashier. Do you know anything about that sheet?

A. What was it on?

Q. I don't know; I never saw it; but a witness said there was a lot of Cash Items.

COURT.—A list of McCormick items.

Q. McCormick items, in July, 1926, or thereabouts.

COURT.—Some time in June, and before August.

A. I doubt if I made out a list and gave it to him; I don't think I did.

Q. Then somebody else must have made out that list.

COURT.—If one were made out, certainly they did, if he didn't make it out.

Q. Could you tell me, please, who might have made that list out, besides yourself, that had access to the same facts that you did?

A. Anyone else in the department of Mr. Fraley, any of the auditing department, or he may have gone in there and made the list himself.

Q. Mr. Fraley? A. Mr. Bates.

Q. Mr. Bates could have gone in there and made a list himself? A. Very easily. [453—121]

Q. Mr. Olmstead could have done the same thing, couldn't he? A. Yes.

Q. Wasn't anything to prevent anybody doing it that had a right to be in the bank, was there?

A. No, I guess not.

Q. Now, did you ever—during the period you

(Testimony of —— Decker.)

were there, from 1920 to 1927, were you in the collection department all that while? A. No.

Q. What part of the latter part—you were there in 1925; were you there in 1924, in the collection department?

A. I think I was there since 1922.

Q. Now, did you ever see Mr. Metschan and Mr. Spaulding, and Mr. Charlton, working around there as an examining committee? A. Yes.

Q. Did they ever come into your department since 1922?

A. I don't know that they have ever been directly in our department; they have always had all our stuff.

Q. I say, did you ever see them in there at any time from the time you first went in the collection department, until the bank closed? Did you ever see them in there at any time?

A. I can't say that I have, strictly in the department.

Q. Did they ever inquire of you about any particular item in that department?

A. I don't remember that they did.

Q. And do you know of anybody in that department with you that they inquired of for items in that department? A. I don't know of any, no.

Q. What is that? A. No, I don't.

Q. Well, with respect to your duties in the bank, what is the fact as to whether you would be in that department during banking hours most of the time, or only part of the time?

(Testimony of —— Decker.)

A. Most of the time.

Q. Would it be true to say, as far as you know the fact, and were there, that had anybody inquired of that collection department for information about checks returned, you would have known about it?

A. Well, the item could have easily been given without my knowing it, but I presume I would have known it. Mr. Reed could have given the information." (R., 504, 505, 506.)

Then the Court asked the following questions and the witness gave the following answers:

"COURT.—What did you do with the collection item then?

A. Then it was necessary to hold it as a Cash Item.

COURT.—How long?

A. Until it was taken out of the Cash Items.

COURT.—I understand that.

A. Three or four days probably, or maybe the next day, or maybe the same day. [454—122]

COURT.—How was it taken out of Cash Items, by giving another check?

A. Another check was drawn and deposited to the credit of the company, and then these checks were debited back to the company to offset it.

COURT.—That was the course of doing business?

A. Yes." (507.)

Thereupon the witness was asked whether he wanted the Court to understand that it was usual in 1925, when he first knew about the McCormick account and then it stopped awhile, and then it went

(Testimony of —— Decker.)

into 1926, down to the time the bank closed, the practice in his department for the McCormick account to be handled by charging back only some items when there was money to meet it, and he gave the following answers:

"A. That is right.

Q. And other times holding it open until they could get a check in to cover it?

A. That is correct.

Q. And that is the way that happened all the time, is it?

A. That is the way that account was handled all the time.

Q. That you were there? A. Yes, sir." (508.)

Then the witness was asked the following question and made the following answers:

"Q. Do you know how Mr. Fraley could have kept the books of the bank without taking into consideration the items that you were so carrying?

A. No, they have to be taken into consideration of the bank's business all the time, each day.

Q. Was anything to prevent, as far as you could see or know, any officer or official of that bank acquiring the same knowledge that you yourself had during the period of this transaction?

A. No, I don't.

Q. Now, did you have anything to do with these things we call Bills in Transit?

A. Yes, those were in our department.

Q. Those were in your department? A. Yes.

(Testimony of —— Decker.)

Q. Now, not to be technical, but I want to know this: Do you call these things that we have been talking about, as the Court and I have called checks which you treated as Cash Items, Bills in Transit? A. No, sir. (R., 511, 512.)

. . . . . .

Q. And in this McCormick instance it amounted to taking a chance on the check being paid before anything was applied to the account? [455—123]

COURT.—Their check was credited to the account when deposited?

A. That is right.

COURT.—The check was credited to the account when deposited, and credited as cash.

Q. And so the amount which you had checks unpaid, the bank was always out that money?

Q. Now, then, there is another difference as I understand it, between these Bills in Transit, and collections, and that is one was an uncharged item, that is you put it through without any charge there, for service or collection fee to the customer; and the other character of transaction, to wit, a regular transaction perhaps, unless was some very large customer, or some favor existed, he was charged for that service. Is that right?

A. No, that is not right.

Q. What is right, then?

A. Bills in Transit, each one—collection charge is made on collections as well as on Bills in Transit, each one of them; that is none of them were handled for nothing. The charges were not the same,

(Testmony of —— Decker.)

weren't figured the same, but neither was handled for nching.

Q. Vell, then I am to understand that on the so-called Bills in Transit in this McCormick account there was a charge?

A. Those are not Bills in Transit items.

Q. I thought you said no difference between these checkscharged as Cash Items, and Bills in Transit?

A. No, I didn't say that, I think.

Q. Then I certainly misunderstood you.

A. Credit has been given on both of them. They had credit for these—what we call Bills in Transit had ben credited to the depositor; in that respect they were alike.

Mr. LOGAN.—As I understand it.

COURT.—When they came back to your department and came back unpaid; they went to the collection department.

A. It is a little unfortunate that the collection department happened to be mixed up with the Cash Items, because Cash Items are really entirely foreign to the collection department. They could be handled in any department of the bank just as well; collection item has nothing to do with these Cash Items at all, except we had them; they haven't anything to do with the department.

Q. Under whose instructions do they get into your department?

A. They simply had always been there.

Q. That is the way you ran the bank?

(Testimony of —— Decker.)

A. Yes, sir; we had to take care of them somewhere, and it is the collection department takes them; but they haven't to do with the collection part of the collection department.

Q. Now, do you have any knowledge of your own as to whether or not any of these items existed after April or May, 1926?

A. That was just previous to the opening of this account, wasn't it? [456—124]

Q. No, this account opened in March, according to this here.

A. Yes, there were lots of them; they are all right on these sheets.

Q. Those sheets there? A. Yes.

Q. Do you know what the total carry was of those items on the 19th of November, 1926?

A. I do not.

Q. If Mr. Fraley gave that amount, he would be the likely one to know, wouldn't he?

A. Yes, if he can make a statement; he could tell if he could find his record; in all probability there was no record except a temporary one made.

Q. Well, they did make them, you say, from time to time, for Hoyt, Bates, and Fraley?

A. I always made one for Mr. Hoyt and Mr. Olmstead; I don't know about the rest of them." (R., 512, 513, 514.)

On cross-examination, this witness testified as follows:

When the McCormick account was opened pres-

(Testimony of —— Decker.)

ently checks which had been deposited and for which credit had been given, were returned by the drawee banks unpaid. They would then find their way into the department handled by the witness and would be classed as "Cash Items." They would be held there until they were taken care of. If for lack of funds in the depositor's account they could not be charged back to the depositor's account, they would be held until the depositor took care of them, either by making a new deposit to increase his balance so that these returned items could be charged back, or until he would take them up in some other way.

"Q. The amount that was on hand in these Cash Items. And the question you answered a moment ago about how much was being carried at any specific date, did you interpret that to mean how much the total of these Cash Items would be at any date? That is what you understood, is it not?

A. I understood the question to mean if I knew how many of these McCormick Lumber Company checks had been credited to their account? I didn't know that. [457—125]

Q. You would have no way of knowing at any time which ones of the checks thus credited were going to be paid, and which ones were not going to be paid? A. No.

Q. And you could at any time make a statement of the returned checks?

A. In the Cash Items, yes.

(Testimony of —— Decker.)

Q. In the Cash Items of any particular day?

A. Yes.

Q. And that of course would change from day to day, would it not? A. Yes.

Q. The daily statement of the bank necessarily would show the total of Cash Items in your hands at the end of each day's business? A. Yes.

Q. And whatever McCormick checks that might happen to be there, deposited checks returned unpaid, would be given in that total? A. Yes.

Q. And that total, I take it, would vary considerable from day to day? A. Yes, it would.

Q. And that Cash Item, is there anything else that goes in that except the returned unpaid checks?

A. Well, a few little expense tickets that were only charged up twice a month, perhaps. The rest of the items were all small, salary advances, and such things as that. [458—125-a]

The principal part of that Cash Item total, then, would be returned checks?

A. Unpaid checks, yes.

Q. That had been credited to the depositor's account, but had not been paid by the drawee Bank?

A. That is right.

Q. And that, as you say—the total of that would vary from day to day? A. Yes.

Q. But you could furnish at the close of every business day, the total amount of Cash Items appearing in your department? A. Every day.

Q. You were asked about the members of the Examining Committee and their investigations, and

(Testimony of —— Decker.)

you said that they didn't actually come into your department. Do you mean by that that the examining committee didn't have any opportunity of examining what was going on in your department?

A. No, sir. I answered it just as it was asked.

Q. I know you did, and I would like to have you supplement that by giving the facts how they examined your department.

A. The Cash Items were listed in the usual way, whenever the examining committee was in the Bank and they were handed to Mr. Fraley with a list of all the Cash Items, that he might go over them with the examining committee.

Q. And if at the close of the day when the examining committee was doing this, there were a few, or only a few, or no Cash Items, the examining committee then would have no way of knowing how much was on the way for collection, or returned, would they? A. No, they wouldn't.

(Questions by Mr. HAMPSON.)

Let us assume that the first day of the month $50,000 had been charged back because the drawee Bank had not honored the item, and you had called that to the attention of Mr. Olmstead, and corresponding credit had been made to the account of the depositor, at the end of the day that report would show clear in your department, wouldn't it?

A. Yes, sir.

Q. And if an examination were made by a Bank Examiner, or examining committee, or any Bank official who had no knowledge of the fact that these

(Testimony of —— Decker.)

items had come into your hands and been wiped out by this corresponding item, there wouldn't be any way he could tell that from your record, could he?

A. No way.

Redirect Examination.

(Questions by Mr. BRISTOL.)

I just want to know one thing you answered for Mr. Hart. You said it would show in the Bank records what those totals were each day. Now where would that show in the Bank records?

A. Show on our daily sheet, collection department, where they were listed. [459—126]

Q. And you turned that in to whom?

A. Turned it in to the general bookkeeper in the same way.

Q. To Mel Young? A. Yes, sir.

Q. And then Mel Young would enter them, and that entry you don't know anything about?

A. That is the entry I can't say positively." (R. 518, 519, 520, 521.)

TESTIMONY OF WALTER R. RINGSRED, FOR COMPLAINANTS.

WALTER R. RINGSRED testified that he started as junior clerk and worked up in the Bank to the position of assistant cashier, in charge of the personnel and the physical operation of the Bank, and that covered the period down to the time the Bank closed; that he was familiar with the McCormick account from the start, and particularly when

(Testimony of Walter R. Ringsred.)

it was the Bank in 1926, about July, and that checks were then being deposited in the Bank and were placed to the credit of this account but many of them were being returned unpaid. This was discussed with several junior officers, particularly Mr. Bates, and when the checks were brought to Bates for O. K., he referred them either to Olmstead or others who would have O.K.'d. them. These checks went through the collection department and the transit department—that is to say, if a check came in for the McCormick account it would come to the deposit window for deposit and then be sent to what the Bank called the interior clearing-house department, and there it would be re-routed to the particular department that would send it out for collection; if it was the transit department it would be sent there and if a clearing-house item it would go to the clearing-house department; if it was a check on some outside Bank, say on a Bank in Pennsylvania, the Brookville or the Titusville or the Crawford Trust, it would be routed from the clearing-house department to the transit department and from there be sent for [460—127] collection; that when it was returned to the collection department it was carried as a Cash Item and if it was charged back, it would be charged back as a transit bill by Mr. Horstman, and all these Cash Items get into the collection department as returned checks and were carried there as Cash Items, and that that was true at all times.

The witness then testified that an ordinary cus-

(Testimony of Walter R. Ringsred.)

tomer's account under these circumstances would have the check charged back to him on the one hand, or collection would be made on the other, and that would end the transaction. Whereupon the Court asked the witness whether or not that was the practice of the Bank with the McCormick Lumber Company and the witness answered that it was but that the McCormick Lumber Company seemed to be an unusual account, because if all the checks had been charged back they would have created an overdraft, and if there were no funds there then these checks would be carried as Cash Items in the collection department, and that was the practice of the Bank in connection with the McCormick account. (R., 528.) That in July, 1926, the approximate amount of these checks was $100,000.00, as a guess, and when the practice was so continuing and they came to the end of a day's business and had a total of these Cash Items, the total would be carried on a general ledger in the Cash Items account, and the items themselves would be placed in the vault; that is, the physical checks would be taken as so much of the Bank's cash and put in the vault and treated as the Bank's cash, and anybody counting the cash or seeing what the cash was in the Bank, would [461—128] have to take these checks into consideration; and when these checks got into the Cash Items on the general ledger and the amount of them was put in the statement for that particular day by Mel Young the bookkeeper, and the checks that were out traveling between Portland and any one

(Testimony of Walter R. Ringsred.)

of the eastern Banks, that amount would be carried in the general ledger in an account called Sundry Banks; that if the Sundry Banks account was looked at from time to time it would disclose a number of checks in total that were drawn on the eastern banks, and that Mel Young kept that book.

When returned checks were placed in Cash Items in cases when they could not be at once charged back to the depositor's account, the Cash Items figure which went into the daily statement books would be the totals of such checks plus other expense items which might appear in the collection cage as Cash Items.

The witness approximated the amount of checks deposited to the credit of the McCormick Lumber Company and returned unpaid, in July, 1926, to be $100,000. These checks at the end of any one day might have been cleared up the next day but at various times the amount on hand approximated $100,000. The situation would change from day to day because of the making of new deposits and the return of other unpaid checks.

When deposits of checks drawn on eastern banks were made the McCormick Lumber Company's account was given credit and the amount of the check, when it was send on for collection, would be charged to Sundry Banks. This would be the status of the account during the time the check was traveling [462—129] to Pennsylvania and return.

All of the checks were charged in this way except

(Testimony of Walter R. Ringsred.)

those drawn on Banks which were eastern correspondents of the Northwestern.

Mr. Fraley was auditor of the Bank in 1923, 1924, 1925 and 1926 and up to the time the Bank closed, and made periodical examinations of the various departments of the Bank and he would verify the figures on the general ledger, and had resort to the records that Horstman kept and also to those that Decker kept, and of Mr. Young's records; that Fraley had made audits during the periods of 1923 to 1927. Witness stated that he had seen Mr. Fraley in the collection department in the year 1926, had seen him in Horstman's department and knew that he had examined the cash in 1925 and 1926. That a condition came around the Bank when there were rather large withdrawals, say along early in 1927, indicating that there was concern about the condition of the Bank, immediately after the resignation of Mr. Olmstead about March 1st and continued all during the month of March; that Mr. Skinner had told him to put on more tellers to keep the lines down, possibly near the closing of the Bank; he knew that all the McCormick checks being received for credit were supposed to be O.K.'d [463—129-a] before the McCormick Lumber Company received credit for them, and if Price, Olmstead, Stewart and Skinner were all away, then the checks would go to Bates and he would refuse them unless he had been previously instructed to O. K. them. When they went to Bates he would present them to Mr. Olmstead for O. K. if Olmstead was

(Testimony of Walter R. Ringsred.)

there, and if he was not, either to Stewart or Skinner, (R., 537) and when the witness O. K.'d them, if he ever did, he would have the authority either from Mr. Olmstead or Mr. Skinner, and he would mark Mr. Olmstead's initials with an R underneath them, and if it was Mr. Skinner he would mark "M. S." and "R" underneath. That there was nothing to prevent anybody else in the Bank that was an officer knowing the same things that the witness knew at any time, unless they had instructions not to, and the witness testified that he was not aware of any instructions given at any time, by anybody, that as between the Bank officials themselves the information about these transactions should be suppressed.

On cross-examination this witness then testified as follows:

"(Questions by Mr. HART.)

Mr. Ringsred, I want to get two or three of these transactions accurately defined. The transit department was to handle the collection of items received upon which the depositor had been given credit. That is correct, isn't it?

A. Yes, on checks that were drawn on out of-town Banks.

Q. As distinguished from items that the Bank had in its possession for collection purposes?

A. Yes.

Q. Now, these items upon which credit had been given would be included in Bills in Transit and Items in Transit, would they not?

(Testimony of Walter R. Ringsred.)

A. No, the account Bills in Transit was handled entirely in the collection department.

Q. Well, Bills in Transit then were items upon which credit had not been given the depositor?

A. No, Bills in Transit was an account of convenience, as a matter of fact; it was to handle checks, [464—130] collection items; ordinary collection items come in given immediate credit on the books. The items that went through Bills in Transit was an account which would enable us to give immediate credit and still handle it through our collection department. We usually charged interest for the time it was outstanding in that account.

Q. That would mean drafts with bills of lading attached?

A. Yes, which we didn't care to have handled through our transit department.

Q. Items in Transit would include checks on out-of-town banks upon which the depositor had been given immediate credit? A. Yes.

Q. And those were handled through the transit department? A. Yes, sir.

Q. They consisted of checks on outside Banks, which the depositor had deposited as so much cash?

A. Yes.

Q. Treated as cash by giving the depositor immediate credit? A. Yes, sir.

Q. Then if any of those checks came back unpaid they would be turned over to the collection department and would be included in the Cash Items?

(Testimony of Walter R. Ringsred.)

A. Not necessarily. Ordinarily they would be charged back to the customer's account immediately, right in the department.

Q. But if there was not sufficient balance in the customer's account, then that charge back would not take place until the customer had made a deposit to bring his balance up high enough?

A. That was true.

Q. And in the meantime, until that was done, then the returned checks would be held in the collection department and classed as Cash Items? A. Yes.

Q. Of course it is possible that in some cases these checks might be sent out immediately and collected, a sum equal to the amount of them collected from the depositor.

A. Yes, in some cases they would communicate with the cashier, or whoever had charge of the account in the office, and sometimes they would instruct us to put the item through again, having apparent information that the check would be paid the next time it was presented. There were exceptions to that, of course.

Q. You would take whatever steps would be most likely to clear the customer's account?

A. Yes, sir.

Q. And if at the close of any day there remained some of these returned checks which had not been taken care of, assuming of course the customer's balance was not big enough to permit the charge of the checks against that, the customer's account would remain in the same condition, and these re-

(Testimony of Walter R. Ringsred.)

turned checks would be carried in the collection cage, as Cash Items?

A. Yes, in many instances checks would be charged back even though it did create an overdraft. (R., 539, 540, 541.) [465—131]

The witness adhered to his view that in the case of the McCormick Lumber Company and in the case of any depositor whose account didn't permit charging the returned checks back, they were carried at the end of the day as Cash Items and were treated as such.

TESTIMONY OF JUNE S. JONES, FOR COMPLAINANTS.

JUNE S. JONES testified that the overdraft book was kept on his desk and that he saw Mr. Skinner examine them and that Mr. Olmstead examined them, and that it was in that position all the time he was there in 1925, '26 and '27, and that any officer could look at it; that he knew about the checks in the McCormick Lumber Company account five or six days before it was brought to Mr. Olmstead's attention by the board, when the board took it up with Olmstead, and being pressed by the Court to testify as to just when his was, he stated it was about the middle of February, say about the 14th or 15th, 1927, and that he ran on to it himself, alone, in the collection department; in answer to the Court's question he told what he saw there and that he was looking for Cash Items and picked up the Cash Items himself and asked one of the boys

(Testimony of June S. Jones.)

how they happened to be there. He didn't remember who it was he asked, and inasmuch as checks were being returned and held there as Cash Items he thought it ought to be looked into and receive attention, and he went back and saw Mr. Skinner and THAT PUT HIM IN A VERY DIFFICULT POSITION, BECAUSE HE NATURALLY DIDN'T CARE TO IMPEACH THE INTEGRITY OF THE PERSON WHO HAD O-K'd THE CHECKS, BUT NEVERTHELESS THOSE CHECKS WERE UNPAID, AND HE THOUGHT THEY OUGHT TO BE CALLED TO THE ATTENTION OF SOMEONE IN AUTHORITY, AND HE SUGGESTED TO MR. SKINNER THAT HE GO TO THE COLLECTION DEPARTMENT HIMSELF AND SEE SOME OF THE ITEMS IN THERE THAT HE HAD SEEN. [466—132]

After this witness had so testified, he was then asked what the board did and to this by question and answer he testified:

"A. Why the first thing they did was to discontinue giving credit to such items.

Q. When did they do that, did you say?

A. Well, I can't give you the dates, exactly.

Q. Well, Mr. Price went in there, you know, the first of March. Don't you know that?

A. Yes, it was prior to that time.

Q. Was it prior to Mr. Price becoming president, that they took any action, or was it after?

A. It was prior to that time.

(Testimony of June S. Jones.)

Q. Prior to that time? A. I would say.

Q. Then it was before Olmstead went out?

A. I would say possibly two weeks before that.

Q. Then it was before Olmstead went out?

A. Yes.

Q. What next did you do?

A. I wasn't a member of the board.

Q. Well, you must have a notion about what you have told us, as to what the board did. You ascertained that from somebody. Let's see what else you know.

A. It was self-evident the board had taken action, because we had been notified of the fact that under no circumstances were further items to be taken for deposit.

Q. We had been notified. Who was 'we,' and who gave you those instructions?

A. The other officers of the Bank.

Q. What other officers there?

A. Other junior officers; Longshore, Brown, and Bates.

Q. Who gave you those instructions in February, before Olmstead resigned?

A. I presume—I don't remember definitely; either Mr. Skinner or Mr. Stewart; I presume Mr. Skinner.

Q. That is a presumption. Can you tell me for a fact, which?

A. I would say either of the two, possibly Mr. Skinner.

Q. Did Mr. Price say anything about it?

(Testimony of June S. Jones.)

A. As far as giving orders as to how the account was to be handled, or what we were to do?

Q. That is what I am asking about.

A. He might have, I am not sure.

Q. Do you know whether or not he did?

A. I wouldn't say for sure.

Q. Would you say he did?

A. No; I would say he might have; it is possible he did.

Q. Now, when you looked, as I understand it, in February, in the afternoon at three o'clock, about the middle of February—this was, as I suppose, about the 15th of February?

A. No, I would say it was about four or five or six days before this first meeting of the board.

Q. Now this first meeting of the board that you refer to, was the meeting at which Mr. Olmstead resigned? [467—133]

A. No, no; I take that, as I learned afterwards, to be the meeting at which time he was faced with the proposition, and the matter was discussed with the directors.

Q. The reason that I want to fix the date, Mr. Jones, in your recollection, is this: That I asked Mr. Skinner while he was on the stand, and I only bring it back now so as to see whether your recollection is different than the record shows—I asked Mr. Skinner if were any meetings of the Board between what is shown here, the 2d and 4th of February, and the 1st of March.

A. Whether or not any meetings?

(Testimony of June S. Jones.)

Q. Yes; and he said there were not, because the record doesn't show any.

A. Well, I am sure I have no knowledge of that at all.

Q. I beg pardon?

A. I have no knowledge of that at all; the records will speak for themslves.

Q. What I am getting at—so both ourselves and the Court are informed—you say was a meeting of the board between February—

COURT.—Formal or informal meeting?

Q. Any kind of a meeting.

COURT.—I suppose they met in conference.

Mr. BRISTOL.—The by-laws provide that whenever the board has a special meeting, and also a regular meeting—

COURT.—I suppose the member of the board might gather at the Bank and discuss informally without making a record?

Mr. BRISTOL.—Yes, they might, and that would not be official.

Mr. HAMPSON.—Would be efficient, but not official.

Mr. BRISTOL.—I don't know whether it would or not.

A. This meeting that I have reference to might possibly be an informal meeting.

Q. When did it take place?

A. I would say in the neighborhood of February 15th.

Mr. HART.—Can't we fix that date by the time

(Testimony of June S. Jones.)

when the crediting of the McCormick Lumber Company's checks stopped?

A. That is the meeting to which I referred.

Mr. HART.—When the McCormick Lumber Company checks were no longer received for immediate credit.

Q. Now, I tried to find out when the directors met. You say a few days one way or the other. What I want to know is the time that you went in this collection department at three o'clock in the afternoon. That is what I am after.

A. If I might be told from the records at what time the action was taken to stop the depositing of the checks, I could better tell you approximately that date, because it was possibly five days previous to that.

Q. There is no record—that is what the Court suggested just now. There is no record when the board stopped payment of any checks, according to the official minutes of the board. I tell you frankly, this does not show in the records.

A. I am not familiar with that.

Q. I am not trying to show anything but what you know. I asked Mr. Skinner whether there were any meetings between February 2d or 4th and March 4th, and he told me there were none; and that is what the record shows. [468—134]

Now, the Court suggests that it was an informal one. That is immaterial to me. I want to know how you fix the time you went into the collection department and got this amount of $250,000,00.

(Testimony of June S. Jones.)

A. Don't misunderstand me. I just happened to run on to that when I was in there.

Q. All right. What date was it, please?

A. About five days prior to the time that we all had notice that the deposit of checks of the McCormick Lumber Company was to be discontinued.

Q. How long was that before Mr. Price became president? Mr. Price became president, according to the records here, March 1st.

A. Yes, I would say that was approximately from two to three weeks prior to that time.

Q. Olmstead was still president *at time,* then?

A. Yes.

Q. You say that was when Olmstead was in there? A. Yes.

Q. And you looked while Olmstead was still president of the Bank, along then about the 15th of February?

A. I would say a little prior to the 15th of February.

Q. Would it be correct to say about the 10th of February?

A. I would have an idea that would be about the date.

Q. Now then, three o'clock in the afternoon of the 10th of February, you went in the collection department, and found how many of those checks, you say?

A. Oh, I would say there were possibly—

Q. $250,000?

A. Approximately; that is to say, I added them

(Testimony of June S. Jones.)

roughly in my mind, and I would say possibly $200,000 to $250,000.

Q. Now, did that represent the day's business?

A. Oh, I haven't any idea.

Q. Or an accumulation?

A. I haven't any idea; it might represent an accumulation of two or three days.

Q. Might have, you say?

A. I wasn't interested in the accumulation. I was interested in the fact that they were there.

Q. You had never heard of it before?

A. Heard of what?

Q. You had never heard of any such checks being carried in that department, that collection department, before?

A. I had no contract with the collection department.

Q. I say, you had never heard that any such checks had ever been carried in the collection department before?

A. I wouldn't say I hadn't heard; I don't recall that I had.

Q. I understand you to say that the first time that you learned about it was when you went to the collection department yourself. Now, did you hear at any time prior, and if so when, that checks were being O.K.'d by Olmstead, or anybody else in that collection department, and carried as Cash Items?

A. I might have heard of it, I can't say; I had no contact with the collection department. [469—135]

(Testimony of June S. Jones.)

Q. I didn't ask you that. Mr. Hart having accused me of having tried to trap you, I want to be fair with you. We have some testimony here, at least I think it is testimony, that certain things were generally known. I am trying to find out whether you had any notice or knowledge of it. Now, if you can tell me when you first heard it, whether or not by instructions of anybody, or orders of anyone, or O.K. of anyone, that any McCormick checks were carried in that bank, I want to know when you first heard it?

COURT.—What kind of checks? You mean out-of-town checks that came back unpaid?

Q. Well, checks charged to Sundry Banks, checks treated as Cash Items, or checks carried in Bills in Transit, of the McCormick Lumber Company.

A. Why I probably had less contact with that than any other officer in the bank, because it was out of my work and out of my line.

COURT.—I presume counsel wants to know whether you ever heard that McCormick checks were coming back unpaid?

A. I had heard at different times that Wheeler checks, as we called them in considering all these accounts, had been returned, but Mr. Olmstead handled that account, and I paid no particular attention to it at all.

Q. Everybody left it to Olmstead?

A. Who do you mean by everybody?

Mr. HAMPSON.—Who do you mean everybody?

(Testimony of June S. Jones.)

Q. I mean everybody, the directors, and officers, in this case; and everybody in the Bank.

COURT.—That is a broad question; that is assuming a great deal.

Mr. BRISTOL.—I want to assume it, and see what the witness says.

COURT.—He didn't say anything of the kind, and you ought not to assume that in this case, because that is assuming the very gist of this case.

Mr. BRISTOL.—I say this, to make it clear,—

COURT.—Make it clear by making your question definite and certain, but not include in that kind of a question all the parties in this suit. That is the very gist of this case.

Mr. BRISTOL.—I asked the witness to particularly specify when he first heard it, and I haven't got an answer yet.

COURT.—That was not your question, I beg your pardon.

A. I couldn't say.

Q. You couldn't say when you heard it, but you know you did hear it?

A. The Wheeler checks being returned?

Q. What?

A. The Wheeler checks being returned to the Bank, yes.

Q. That is McCormick, the whole business, that is the McCormick and everything else, was generally referred to in the Bank as the Wheeler transaction, wasn't it? A. Yes.

Q. Now, I say again, do you tell me the fact is

(Testimony of June S. Jones.)

that Olmstead exclusively handled this Wheeler line, nobody else?

A. Why, in the latter years of the Bank I know of no one that had any contact with the Wheeler account at all, but Olmstead. [470—136]

Q. That isn't what I asked. Did you ever talk to the board yourself about any of these matters, or any member of the board? A. No.

Q. Did you talk to your junior officers about it?

A. About what?

Q. The Wheeler line, during the years 1924, '25, '26 or '27. If so, when?

A. I might have, I wouldn't say I had not.

Q. Did any junior officer ever talk to you in 1926?

A. He might have; I wouldn't say he did.

Q. Do you recall whether he did or not?

A. No.

Q. Didn't you see Mr. Bates several times, and didn't Mr. Bates see you and discuss with you the question of the Wheeler line, and how they were being handled?

COURT.—The Wheeler lines?

Q. Yes, the Wheeler lines; and as to what was going to be done about it?

COURT.—The Wheeler lines; that is very broad.

Mr. BRISTOL.—He has told me this very matter was known as the Wheeler matter in the Bank.

Mr. HAMPSON.—The whole examination is improper; he is cross-examining his own witness.

A. I would say, Mr. Briston, Mr. Bates would

(Testimony of June S. Jones.)

be the last one at the bank to discuss the Wheeler lines, because he had nothing to do with the credit department, had nothing to do with the loans of the bank, and in fact didn't make any loans; so I am reasonably sure that I never discussed the Wheeler lines with Bates.

Q. And am I to understand that Mr. Bates had nothing to do with the McCormick checks?

COURT.—He didn't say that.

A. I didn't say checks. You asked me about the Wheeler lines. The Wheeler lines were handled by Mr. Olmstead, and as I say, Mr. Bates had nothing to do with the investments of the bank, or the loans of the bank.

Q. Now, we have it, if that is the case. Now then, did Mr. Bates ever discuss with you the McCormick checks that were coming back and treated as Cash Items?

A. He might have; if he did it was only casual remarks, because neither he nor myself had any authority to do anything, and if it was —

Q. That being your answer to that, did you ever see Mr. Bates in July, or June, with a list of these unpaid Wheeler checks, or McCormick checks, or checks treated as Cash Items, under the McCormick name, or the Wheeler name?

A. I did not,—I believe not.

Q. Did you ever discuss it with Mr. Skinner, or he with you, except at the time you say in February?

(Testimony of June S. Jones.)

A. Do I understand you to mean checks of the McCormick Lumber Company?

Q. Yes.

A. Mr. Skinner never discussed it with me.

Q. Nor Mr. Stewart?

A. Nor I with him. (R., 556, 557, 558, 559, 560, 561, 562, 563, 564, 565.) [471—137]

The witness then testified that he knew of the Wheeler lines of credit in the Bank, and he felt his guarantee represented some additional strength to the loans; and he then testified that at the time he told Mr. Skinner that Olmstead wasn't there, that it was after three o'clock in the afternoon, and he was asked whether or not he had mentioned the matter to Olmstead the next morning and he said he had. Thereupon he was asked this question and gave the following answers:

"Q. Was there any reason there, Mr. Jones, that you know of, that indicated that Mr. Olmstead was doing something that nobody else knew anything about?

A. Well, I was—I was surprised to find a number of checks in these accounts, in the Cash Items unpaid, and naturally felt that it should be called to the attention of somebody in the bank with authority; and that was the reason for my action that afternoon.

Q. But your occasion for going there at that time, was on account of the inquiry for warrants from another bank?

A. I happened to run across them.

(Testimony of June S. Jones.)

Q. You happened to run across them?

A. I happened to run across them, yes, when I went in.

Q. Now, the natural thing, if Olmstead had it in charge, was to take it up with Olmstead. You say he wasn't there. He came back the next day after you told Skinner?

A. Why, I presume he was there.

Q. Did you say anything to Olmstead then?

A. No, I didn't say anything.

Q. Did you ever discuss it with Mr. Olmstead?

A. I don't believe I ever did.

Q. Did you ever discuss it with Mr. Stewart?

A. Not prior to that time, I don't believe. I had discussed the Wheeler lines of credit.

Q. Yes, I don't mean that. I mean these Cash Item checks? A. No.

Q. And outside of that one conversation now, with Mr. Skinner, you didn't discuss it again with anybody?

A. I told no—not until after many days after that.

Q. Quite a while after. Down near when the Bank closed some time?

A. No, possibly seven or eight days; a week, or something of that kind.

Q. Who did you talk to at that time?

A. Oh, we were all discussing it then.

Q. What was done about it? [472—138]

A. What was done about what?

(Testimony of June S. Jones.)

Q. About these checks. Did you find out there were any more then?

A. When they all came back there were more of than that number, of course, and they totalled somewhere near $800,000.00.

Q. What was done with them?

COURT.—Done with what, these checks?

A. The checks? Nothing was done with the checks.

Q. What is that?

A. Nothing; I don't remember anything was done with the checks.

Q. You don't know that anything was done with them at all?

A. No; the checks were unpaid; remained as assets of the bank; I believe still are.

Q. And remain so, as far as you know?

A. I believe so, yes.

Q. And that continued on down until you left the Bank?

COURT.—And what continued?

Q. Checks left in the same condition.

COURT.—Remained unpaid.

Q. As when they were made.

A. When I left the bank after liquidation, yes, as far as I know." (R., 571, 572, 573.)

The witness then testified that in the latter part of February, 1927, Mr. Price told him that he was to accompany Mr. Skinner and Mr. Stewart in connection with the proposition that the Bank would be sold, or would be offered to the First National

(Testimony of June S. Jones.)

Bank of Portland, Oregon; that he went to the banking quarters of the First National Bank and met a committee of officials consisting of C. F. Adams, Elliott Corbett, W. L. Thompson and Mr. E. A. Wyld; that the reason he was sent down there was that he was familiar with the credit of the Northwestern National Bank; and that either Mr. Price or Mr. Skinner told him what he was to do and they told him to go down to the First National and discuss the assets of the Bank the paper in the Bank, and the various investments the Bank owned. Thereupon the witness was asked what the reason was that led up to this negotiation and if he knew what the reason was, and he testified by question and answer as follows: [473—139]

"Q. There must have been some reason that led up to this. Do you know what the reason was?

A. Reason?

Q. That led up to this offer of you going down there to the First National Bank? A. Yes.

Q. What was it about?

A. The reason was these $800,000. of unpaid checks of Wheeler we had.

Q. That was the reason?

A. That was the reason.

Q. That you wanted to sell out, you mean?

A. Well, that would appear to be quite sufficient reason.

Q. And you disclosed the fact to the First National Bank, didn't you? That is, to Adams, Corbett, Thompson and Wyld?

(Testimony of June S. Jones.)

A. I don't know that that was discussed." (577, 578.)

Witness was then asked if he wanted to leave the impression with the Court that the Northwestern National Bank, on the day he discussed with Messrs. Corbett, Thompson, Adams and Wyld, was a concern of the value of twenty million dollars and he answered, "Twenty million dollars resources." (579.)

Upon resuming direct examination (R., 584) this witness testified that he was one of the trustees of the Dufur Orchards Company or Durfur Fruit and Farm Company, that he was an appointee of the Bank; that all negotiations with the First National Bank took place before Mr. Price became president, that Mr. Olmstead's resignation followed and Mr. Price succeeded him as president of the Bank. He then testified that it was his understanding that the Bank would continue under Mr. Price's direction of the board of directors—with the plan of subsequent assessment. When questioned, he said he meant "the plan in connection with the reorganization of the Bank," then disclosing that he had spent four or five days with the Examiner at the time the examination was made about March 5, 1927, going over the assets of the Bank and revaluing them with the Examiner; that at that time [474—140] the unpaid McCormick checks had gotten up to something slightly less than $800,000.00 and were still carried as Cash Items when the

(Testimony of George W. Hoyt.)

examination was made on March 5th; that that was his recollection.

TESTIMONY OF MISS LOUISE STEUER, FOR COMPLAINANTS.

MISS LOUISE STEUER testified that the Examining Committee's report which was heretofore introduced in this record, dated December 7, 1926, was written by her from memoranda given her by Mr. Olmstead, (592) and she was certain that Olmstead gave her the memo. for that purpose. (598.)

TESTIMONY OF GEORGE W. HOYT, FOR COMPLAINANTS.

GEORGE W. HOYT testified that he began his career as a banker in 1892, that he came with the Northwestern National Bank in 1915 and was assistant cashier there from 1923 to 1927 inclusive. That in July, 1926, Mr. Decker called his attention to some Cash Items or Wheeler drafts amounting to about $81,000.00 and to McCormick Lumber Co. checks of approximately $182,000.00. That on August 30, 1926, he found the situation to be a total of $218,770.00 from McCormick checks carried as Cash Items and that there were cash items of the same magnitude or amounts at odd times; that when he first heard of this matter, in July, 1926, he reported it to Charles A. Stewart, reporting to him the exact items he had given in the record.

That after he had spoken to Mr. Skinner and Mr. Stewart about it, about the 10th of February,

(Testimony of George W. Hoyt.)

1927, he didn't pay any more attention to it but Skinner told him that the matter had been called to the attention of the board of directors and that it was in their hands. That Brown, Bates, Ringsred and Fraley knew the situation as he did. (609.) [475—141]

On cross-examination (614) the Court then asked the witness the following questions and he gave the following answers:

"COURT.—Mr. Hoyt, did you get your information from the daily statement, or from the items themselves?

A. I got it from the items themselves, in the collection cage.

COURT.—I wondered if you got from the daily statement, carried over from the daily statement, or whether you found the items themselves?

A. No, I found the items.

COURT.—You don't know whether they were taken care of during the day or not?

A. No, I couldn't say as to that." (R., 616.)

TESTIMONY OF FRANK O. BATES, FOR COMPLAINANT.

FRANK O. BATES, the cashier, was then called as a witness, and testified that the loaning officers of the Bank were Messrs. Olmstead, Price, Skinner, Stewart, Longshore and Jones. That in 1926 he knew of the account commencing March 29, 1926, of the McCormick Lumber Company and that his

(Testimony of Frank O. Bates.)

attention was called to the overdrafts and "Cash Items" checks as testified to by the other witness, and that he gave the information he obtained to Olmstead in 1926 *q*nd later in the fall and talked it over with Hoyt, Skinner and Stewart and with O. L. Price (626) and in the early part of 1927, and that the items were large enough to call them to their particular attention; that anyone could have ascertained from the statement book or from the daily overdraft book the exact amount of the Cash Items that were going through; that about March 1st, 1927, some seven hundred thousand odd dollars of these Cash Items were charged up against Claims and Judgments, and the general books disclosed the facts; that the first thing that is done in the morning when a Bank is opened is to count the cash and to consult the daily statement and see what the condition was, and during the period of these transactions which are under discussion the checks in the collection department would be a part of the general cash in the Bank. (636) [476—142]

TESTIMONY OF WALTER H. BROWN, FOR COMPLAINANTS.

WALTER H. BROWN testified that any out-of-town items, in the practice of the Bank, which were for immediate credit would have to be O. K'd. by some officer of the Bank, whether it was Wheeler's account or anybody else's or the McCormick Lumber Company's account, and that if Olmstead was not there, the matter would be referred to the other

(Testimony of Walter H. Brown.)

senior officers, Skinner, Stewart or Price or whoever might be available. (644–45.) That the daily statement book of the Bank was kept on his desk, and it was there every day; as it was his custom and usage to have it on his desk every morning; and it was generally understood and discussed that there were times when there were large items in the Cash Items which were being carried, among officers like Mr. Bates, Mr. Hoyt and himself. In answer to the Court's question that the amount of Cash Items were finally credited to Claims and Judgments, witness said he knew that that was done but he did not know who gave the instruction that this be done, but he testified that the stockholders of the Bank made up a fund to take care of the checks, and that the records of the Bank ought to show what was done with that fund.

TESTIMONY OF MEL YOUNG, FOR COMPLAINANTS.

MEL YOUNG testified that he was the bookkeeper who kept the general books from 1915 on, and he identified the daily statement referred to by the witnesses and testified that it was rendered at the close of business each night; that it was kept by him; that the Northwestern National Bank was a member of the Federal Reserve System; that Cash Items were entered daily on the statement as handed to him, after they came to him from the interior department of the [477—143] Bank and that he got his Bills in Transit from the collection

(Testimony of Mel Young.)

department and the Sundry Banks items from the transit department; that he entered the actual transactions accordingly and then he delivered the statement book down in the officers quarters the next morning and it would remain there until closing time, then he would go after it and get it.

The witness was then asked to take the statement book showing the Bank's condition as of June 30, 1926, and by question and answer to give from the record the dates and items which appeared under the respective headings "Sundry Banks," "Bills in Transit," and "Cash Items" on each respective date to which the question related, and the same were as follows:

Date.	Sundry Banks.	Bills in Transit.	Cash Items.
y 6 1926	1,137,924.74	69,706.14	15,502.90
ne 30 1926	1,631,667.90		
ly 1 1926	1,634,250.43		
ly 9 1926	1,615,220.85		
ly 12 1926	1,504,016.29	63,036.25	238,510.97
ly 13 1926	1,667,339.00		
y 22 1926	1,640,820.29	38,527.05	37,378.44
y 23 1926			207,423.93
g. 14 1926	1,698,734.59		
g. 17 1926	1,740,177.86		
g. 20 1926	1,631,294.83		
g. 27 1926			24,765.86
g. 28 1926			41,244.74
g. 30 1926			254,825.49
t. 4 1926	1,621,962.96		
t. 8 1926	1,850,563.33		

Date.	Sundry Banks.	Bills in Transit.	Cash Items.
Sept. 14 1926	2,028,985.50		
Sept. 15 1926	2,062,964.15		
Sept. 21 1926	1,601,557.86	49,233.49	72,261.42
Sept. 24 1926	1,626,651.99		
Oct. 5 1926	1,693,071.04		
Oct. 9 1926	1,730,510.61		
Oct. 12 1926	1,694,888.64		
Oct. 14 1926	1,774,949.82		
Oct. 15 1926	2,014,279.50		
Oct. 16 1926	2,020,186.89		
Oct. 20 1926	1,667,623.43		
Oct. 22 1926	1,807,682.04	67,568.03	
Oct. 23 1926	1,980,499.69		
Oct. 26 1926		143,367.34	
Oct. 30 1926	1,745,595.03	223,505.49	
[478—144]			
Nov. 1 1926		226,794.95	
Nov. 4 1926	1,814,350.01		
Nov. 9 1926	1,916,766.71		84,627.99
Nov. 10 1926			499,967.97
Nov. 13 1926			215,204.22
Nov. 15 1926	1,986,967.53		155,485.55
Nov. 16 1926	1,953,506.21	58,601.55	159,103.36
Nov. 19 1926	1,833,084.44	53,097.16	20,731.44
Dec. 7 1926	1,713,930.38	84,664.89	105,699.89
Dec. 10 1926	1,607,534.06		
Dec. 30 1926	1,582,746.24	99,761.06	117,811.14
Jan. 3 1927, Clo.	1,572,115.31	cl. 104,567.97	

(Testimony of Mel Young.)

Date.	Sundry Banks.	Bills in Transit.	Cash Items.
Jan. 3 1927	Beg. 1,749,833.84	beg. 102,660.33	
Jan. 6 1927	1,622,160.48	155,712.50	
Jan. 15 1927	1,715,213.93		
Jan. 17 1927	1,717,983.20	106,285.54	
Feb. 5 1927		176,443.64	
Feb. 11 1927	1,608,939.52	98,248.64	169,132.16
Feb. 15 1927			780,751.94
Feb. 16 1927			794,935.06
Feb. 19 1927			818,797.17
Feb. 25 1927			823,350.76
Feb. 28 1927			823,877.45
Mch. 1 1927			68,002.83

Thereupon, upon question and answer the witness testified as follows:

"Q. Now I call your attention to that last entry, (665) apparently February 28th, in the daily statement book, and which carries the amount you read, $823,877.45 Cash Items. Is that right?

A. That is right, according to this here.

Q. Now, on March 1, 1927, your Cash Items were what? A. $68,002.83.

Q. Now between February 28th and March 1st—that would be the next business day, wouldn't it?

A. Next.

Q. Now here is $823,877.45—so you understand what I mean; the very next day there is $68,002.83. Can you tell me what became—this would be the close of business February 28th? A. Yes.

(Testimony of Mel Young.)

Q. And this would be the close of business March 1st? A. Yes.

Q. Wouldn't that be true? A. Yes.

Q. What became, if you can tell me, if you know, of the difference between the $68,000 on March 1st, of Cash Items, and the $823,000 of February 28th?

A. You will have to ask somebody else besides me, I can't tell you, I don't know; I do not.

Q. Were you keeping the books on February 28th and March 1st? A. Yes." (R., 665, 666.)

[479—145]

* * * * * * * * *

"Q. I notice that the item there, Bonds, Stocks and Securities, as shown by the record of February 28th, is what? A. $1,242,522.36." (R., 666.)

* * * * * * * * *

"Q. Now you show me March 2nd that Other Bonds, Stocks and Securities on the daily statement book are what, by the record?

A. Are $2,039,284.36." (R., 668.)

* * * * * * * * *

"Q. Now the difference that you find upon your record, as you see it is $796,762.00, is it? A. Yes.

Q. Between the date of February 28th and March 2nd? A. Yes.

Q. That is right, on your daily statement book? A. That is correct." (R., 669.)

* * * * * * * * *

"Q. Now, on March 23, 1927, what did this daily statement book show with respect to the amount of your Capital, Surplus and Undivided Profits,

(Testimony of Mel Young.)

giving the amounts separately, if you please. The amount of your Capital, we will understand, so as not to read it every time, was $2,000,000. At that date would it be the same? A. Yes, $2,000.000.

Q. And what was your Surplus in there, as on March 23, 1927? A. Surplus $400,000.

Q. And what was your undivided profits in there?

A. Well, there was—I want to segregate some here.

Q. Well, I say what is the entry there?

A. You don't understand me, I guess.

Q. Understand what?

A. On that undivided profits.

Q. I asked you what does it show here on that date. A. It shows there $30,026.82.

Q. That is what I want to get at first. Will you please take January 4, 1927.

A. Yes.

Q. The capital was the same, was it not, $2,000,-000? A. The same.

Q. Surplus $400,000? A. Yes, sir.

Q. And the entry of undivided profits there is how much? A. Entry $30,026.82.

Q. The same as before?

A. Yes, sir." (R., 671, 672.)

* * * * * * * * *

"Q. Now while you have the 1926 book there, look at July 6, 1926, will you please. What is the undivided profit? A. $90,202.43.

Q. Now, look at April 16, 1926. What does your

(Testimony of Mel Young.)

report show about Undivided Profits as of that date, together with your Capital?

A. Capital $2,000,000, Surplus $400,000, Undivided Profits $7,393.70." (R., 672, 673.) [480—146]

The witness then testified as follows:

"Q. In other words, that is what you did, and computed it so the officers would understand that you did? A. Certainly.

Q. And the net set out here?

A. Net is set out here.

Q. The net is set out below as net profits in figures, so the officers can see it?

A. So can see just what the net profits are.

Q. From day to day? A. From day to day.

Q. You mean by that, without regard to any imputation of your entry—that is not the point I am after, so the Court and Mr. Hart understands—but the real situation in the bank was to give the officers intimate information of what they were doing, and how they were doing it; that was the object of this statement, was it not? A. Certainly.

Q. And you made it up every day, as I understand it, for that purpose? A. Yes, sir.

Q. Now during all the time you were there was the same system that you have exhibited here this morning, carried on?

A. It was." (R., 674 to top 675.)

Upon recross-examination by Mr. HART, this witness testified and the Court and counsel asked the following questions and made the following statements:

(Testimony of Mel Young.)

"Q. Mr. HART.—I would like to put in also those figures at the time the Bank Examiner examined, if I can get the page. Will you read in the record the Cash Items shown on the statement of September 21, 1926?

A. What do you want, the Cash Items?

Q. Yes. A. $72,261.42.

Q. And Sundry Banks?

A. Sundry Banks $1,601,557.86.

Q. And Bills in Transit?

A. Bills in Transit $49,233.49.

COURT.—I don't recall, but did the Examining Committee's report show the examination of the bank as of a certain date?

A. It shows, your Honor, that they examined the Cash on a certain date. Their examination extends perhaps over a week or more.

COURT.—It isn't as of a certain date?

Mr. HAMPSON.—Yes, as of a certain date in every instance.

COURT.—So the Examining Committee report would not indicate the date they examined it?

Mr. HAMPSON.—Not the day the report was dated, no.

Mr. LOGAN.—For instance, the report dated December 7th was not considered until some time in February, and it refers to a date in November as the examining date.

COURT.—That is what I was asking about. [481—147]

(Testimony of Mel Young.)

Mr. BRISTOL.—So your Honor understands, take for instance May 18, 1926.

Mr. LOGAN.—Turn to the one of December 7th, if you will.

Mr. BRISTOL.—Now, May 18th, page 422, is the record of May 18, 1926. It is report to the Board, and the opening statement reads as follows: 'We, your Examining Committee, appointed at the annual meeting, beg leave to report that on May 6, 1926, we started a full and complete examination of the affairs, of this bank, which was completed May 18, 1926.' That would be the date between May 6th and May 18th, twelve days. Now take the one that the young lady identified, just before that. December 23, 1925. The record, page 418, is as follows: 'We, your Examining Committee, appointed at the annual meeting, beg leave to report that from December 3rd to December 22nd, we made a full and careful examination of the affairs of this bank, as of this date.'

Mr. HART.—'As of this date.'

Mr. BRISTOL.—As of this date, from December 3d to December 22d.

Mr. HART.—That is all in the record. The first thing they did was to count the cash, and get these items. That is the practice they followed for every examination.

Mr. BRISTOL.—Mr. Logan asked me to turn to page 434, December 7, 1926, and that one has this phraseology: 'We, your Examining Committee, appointed at the annual meeting, beg leave to report

(Testimony of Mel Young.)

that on November 19th to December 1st we made a full and careful examination of the affairs of this bank, as of date.' And the date is December 7, 1926. That is the one that came before the directors' meeting, according to the record, February 6, 1927." (678–79–80.) [482—148]

TESTIMONY OF —— FRALEY, FOR COMPLAINANTS.

FRALEY testified that he was cashier of the Bank, had been so for several years, had performed the duties of auditor, confirmed the description of cash items and bills in transit as the other witnesses had; that on February 28, 1927, in the Daily Statement Book there were cash items of $823,877.45 and that he got instructions from Mark Skinner to make up certain entries in respect of that item; that on March 1, 1927, the entry remained the same but on March 2d it was changed; that the Examining Committee, Messrs. Metschan, Charlton and Skinner had started their examination at the close of business November 19, 1926, and he had a statement in his pocket showing what that examination was to cover; that the witness had written it up as he always had done and it was usual for him to give that direction every semi-annual examination, and it read as follows:

"Mr. BRISTOL.—Bank Directors' Examination. Assets and liabilities to be examined and state-

(Testimony of —— Fraley.)

ments to be furnished by auditing department. All cash to be audited by auditing department, for the directors, and with their assistance when possible. Bank securities examined and audited from statement of securities as shown by general ledger and security record. Then the words 'Other real estate owned' is that your writing?

A. Yes, sir.

Q. 'Loans and discounts checked and examined from list furnished by note department and from liability ledger sheets themselves. Cash items examined and checked to general ledger from list furnished by auditing department, along with Cash Recapitulation.'

COURT.—You can read it right along; we will assume you read it right.

Q. 'Verification letters sent to all C. H.—'

A. Clearing-house banks.

Q. 'Return letters given to directors with copy of settling statement. Examination of outstanding cashier checks, certified checks, time C/Ds, Demand C/Ds and Bills in Transit, checked from lists made up by auditing department. Expense and interest paid, condensed statement. Assets non-income producing, statement. Loans and discounts on which interest is not paid. Expense book and stock register examined by directors.' And then in writing 'list of [483—149] overdrafts.' That is your writing?

A. My writing.'' (R., 695, 696.)

And the paper that he prepared as auditor as

(Testimony of —— Fraley.)

above quoted was for the guidance of the Examining Committee at that time and, according to his suggestion, the Committee was required to go and look into the Cash Items, and that they did it and they had done so under his suggestion but he was not positive whether they did it November 19, 1926; and that on November 19, 1926, he gave them a list of the Cash Items, and the same was introduced as Complainant's Exhibit 29.

The witness then produced three papers, consisting of two credit memorandums and one debit memorandum dated March 1, 1927, of the Northwestern National Bank and described them as follows:

"Q. The first item is credit stockholders assessment account, March 1, 1927, F. F. Pittock $17.500; Phil Metschan $10,000; E. S. Collins $76,000; O. L. Price special $7500; O. L. Price $29,000; Pittock Estate $769,600; Charles K. Spaulding $20,000; and paid and carried out as $929,600. And initialled 'F,' that is your initial?

A. That is my initial.

Q. And upon that same date, and as part of the same transaction, the next slip was Credit, Profit & Loss account, transferred from Stockholders Assessment Account to take care of charge-offs, $929,600, initial debt. Is that right?

A. That is right.

Q. Now, then, the corresponding entry, or the next part of the transaction is shown by debit slip. Is that right? A. Yes.

(Testimony of —— Fraley.)

Q. As follows: Debit, Stockholders Assessment account, March 1, 1927, F. F. Pittock, $17,500; Phil Metschan $10,000; E. S. Collins $76,000; O. L. Price Special $7500; O. L. Price $29,000; Pittock Estate $769,600; Charles K. Spaulding $20,000.

A. That is right.

Q. Now, the next in order.

A. They come in this way.

Q. Then the next in order gives a credit to profit & Loss March 2, 1927, charge-off 3/1/37, account McCormick Lumber Company and J. E. Wheeler items, should have gone to Other Bonds, Stocks, Securities, etc. $796,762. Opposite that is written 'Claims' and initialed 'F.' [484—150]

A. That is right.

Q. There seems to be a lead pencil notation on that. What is that?

A. Mr. Skinner's initial.

Q. On March 2, 1927, debit 'Other Bonds, Stocks, Securities, etc.' McCormick Lumber Company and J. E. Wheeler Cash Items (see over for list) $796,-762, Claims Accounts, and some initials.

A. That is right.

Q. Likewise initialled by Mr. Skinner in lead pencil? A. Same initial, yes.

Q. And on the back of this are written the items that are referred to on the front of it?

A. That is right.

Q. Showing how the total of $796,762 was made up? A. That is right.

Q. And is that your writing, or somebody else's?

(Testimony of —— Fraley.)

A. My writing." (R., 704, 705.)

The witness then read the items referring to the McCormick Lumber Company aggregating $92,-687.00; then the items similarly referring to McCormick Lumber Company in the Forrest County National Bank, Tionesta, Pennsylvania, $91,000.00, similar checks on Brookville Title & Trust Company, Brookville, Pennsylvania, aggregating $534,-475.00, and similar checks on Titusville Trust Company, Titusville, Pennsylvania, aggregating $75,-000.00. Then the witness testified by question and answer,

"Q. The third group that relates to the ones we first read comprises total sum of $929,600, denotes somewhat of a corrective entry, does it not?

A. The first item of $7500 is correcting entry showing refund to Mr. Price for over-payment on stockholders assessment.

Q. And the second one?

A. The second represents the transfer of stockholders payments on that, in Profit & Loss Account, to Cashier's Checks, which was transferred or given to Mr. Skinner, to be held by him as trustee for the stockholders.

Q. The first paper explains, March 21, 1927, debit Profit & Loss Account, O. L. Price, 3/1, overpayment on stockholders assessment recorded to his account $7,500, initialled by yourself and Mr. Skinner? A. That is right.

Q. In connection with that March 2, 1927, debit Profit & Loss Account entry of 3/1/27, stockholders

(Testimony of —— Fraley.)

payment to guaranty fund, entered as stockholders assessment in error, held in 'CC' meaning Cashiers Checks. A. That is right.

Q. No. 172137, and so you will understand, Mr. Hart, Cashier's Check is No. 172167.

A. I can explain that. [485—151]

Q. I don't care. Less O. L. Price over-payment refund $7,500, and then a deduction from $929,600, that I read in. And the first group of papers should be March 1st, to which this entry refers, showing debit on that slip of $922,100?

A. That is right.

Q. And then you say a Cashier's Check was made out. That is also initialled by you and Mr. Skinner? A. Yes.

Q. Now the Cashier's Check referred to, that was given to Mr. Skinner, 172167 on March 2, 1927, $922,100 and signed by Mr. Hoyt and Mr. Skinner is still holding it? A. Yes.

Q. As trustee for whom, you say?

A. For the stockholders who had paid in on this assessment.

Q. And is the subject of that entry?

A. Yes.

Q. And that is the way—your mind is sufficiently directed to this entry so you know what I am talking about—the way that this was taken care of, as I asked you this morning? A. Yes.

Q. And as auditor did you know—and to be certain if you did I will show you the book as of November 19, 1926, what the amount of Sundry

(Testimony of —— Fraley.)

Bank items was on that date, as shown on the daily statement of the bank.

Mr. MAGUIRE.—That is all in evidence.

Mr. BRISTOL.—I am asking if he knows.

Q. Did you know of that item? A. I did.

Q. And at the time it was entered there?

A. Yes.

Q. And at that time it was what, as shown?

A. The amount was $1,833,084.44.

Q. And at that time your Cash Items was also known to you, was it? A. It was.

Q. How much?

A. $20,731.44.'' (R., 706, 707, 708.)

Q. Can you tell me why, with respect to these papers you produced about this entry, that Mr. Skinner had to O.K. them, why he put his initials on them.

A. Because he authorized me to make the entries.'' (715.)

The witness then identified the statement of the close of business September 15, 1922, as published, and the witness said he prepared it as he had prepared others, and copies of these statements were substituted and offered in evidence commencing with Complainant's Exhibit 30, which was the statement published March 28, 1927.

The witness then testified that he had instructions to refer the Cash Items to Olmstead, and [486—152] that when Hoyt and the other witnesses who had testified about the list of checks had called his attention to that he took the matter up with

(Testimony of —— Fraley.)

Bates and Olmstead, that he had knowledge of the situation on the 30th of August, 1926, as auditor and that Cash Items of McCormick Lumber Company were being returned, that he supervised Mel Young, the bookkeeper, that he made out a list of the checks for Mr. Olmstead, that he made a report to him several times in 1926 of these checks, but he thought that Mr. Bates had his own list; that any officer and/or director had access to the books just the same as he did, and if they wished to investigate the records they could have ascertained, and knew in July, 1926, just what he knew. The reports of the Examining Committee were turned over to Mr. Skinner; that all the checks for the Brookville Title and Trust Company, Forrest County National Bank and Titusville Trust Company were O. K.'d by Mr. Olmstead but if any checks were drawn for less than $1,000 they would not have to be O. K.'d; that he didn't have any instructions in 1924 from the Executive Board when the board condemned the Wheeler transactions; that he left Mr. Bates to inform Mr. Stewart and Mr. Skinner; that there was nothing to prevent him informing directors and other officers of the Bank if he had wished to; that in 1926 he heard of a plan to organize a "Take-over" company to get the affairs of the Bank in a different condition. That this was about the time of the Harris report of the 21st of September, 1926, that rumors about the strength of the Bank had commenced before that time (732) and he communicated these rumors to Price and

(Testimony of —— Fraley.)

'Skinner; and when the Examining Committee on November 19, 1926, started their [487—153] examination they would have to take into consideration Sundry Bank Items $1,833,084.44 and the Sundry Bank Items appeared on the Daily Statement Sheet from time to time; that anybody could have gone to Phil Horstman on any day and found out the Items in Transit, and that this could be checked up with each daily balance, and the same thing would be true of Cash Items. An inquiry could have been made of Mr. Decker.

On cross-examination by Mr. Hart this witness testified,

"Mr. Fraley, directing your attention for a moment to the entries made as of March 1, 1927, as I understand it you made those entries and the purpose of it was to remove the float items entirely from the assets of the bank? A. I did.

Q. You charged the total float to Profit & Loss, and you made corresponding charges which were intended to take advantage of the money deposited by the stockholders? A. That is right.

Q. And then, as I understand it, the Federal Bank Examiner, Mr. Crowley, objected, pointing to the fact that these unpaid checks should be carried somewhere as an asset of the Bank?

A. That is correct.

Q. And you thereupon reversed your entries so as to charge the total of this float to Claims Adjustment? A. That is right.

(Testimony of —— Fraley.)

Q. And you relieved the Profit & Loss Account of former entries? A. I did.

Q. Did you make the entries you first described by your own initiative, or was that directed by someone?

A. That was directed by Mr. Skinner.'' (R., 741, 742.)

Thereupon there was offered in evidence statements given to the Comptroller of the Currency commencing with the date December 29, 1922, with Exhibit 32 and continuing cronologically through the successive years at six months' periods to and inclusive of Complainant's Exhibit 49.

TESTIMONY OF EMERY OLMSTEAD, FOR COMPLAINANTS.

EMERY OLMSTEAD testified that he had remained an officer and director of the Bank and its [488—154] president up to March 1, 1927; that in 1923 Price talked to him about the sale of the stock to the United States National Bank and that Price, Ainsworth and himself had a conference and discussed the consolidation or liquidation of the Northwestern National Bank and turning over the business to the United States National, and the question was about the building and the deal fell through. This was in March, 1923. There was a disposition on the part of the Pittock trustees to sell the stock of the Northwestern National Bank; that the Pittock Estate practically

(Testimony of Emery Olmstead.)

controlled the Bank (842–A); that the bank building cost the Bank $1,690,000 and they marked it on the books at $1,200,000 and $490,000 went into the undivided Profit Account through an appreciation writing up the property, and that just before he resigned as president, March 1, 1927, O. L. Price was negotiating with the United States National Bank again for the disposition of the Northwestern National Bank; that some time in 1925 Price and Morden wanted to sell the stock of the Pittock Estate for $135.00 a share in the Bank; that the reason for writing the $490,000 up was that then they secure funds to take some of the frozen assets out of the Bank and they were justified in writing the building up because of that affair, and it was really done to help the Pittock Estate and to help take care of the frozen assets of the bank by trying to get rid of an $800,000 mortgage against the building (852); all Examiner's reports were discussed with the board of directors, usually by the Examiner himself; that they finally found themselves in 1925 or about 1926 with over $1,500,000 worth of frozen assets, and it was decided [489—155] to organize a corporation and take this stuff out of the Bank. This had been proposed by Mr. Wylde in 1925 but Mr. Price objected to it. The Bank was taking on new loans all the time between 1920 and 1927; the Bank's deposits were constantly increasing and upon the other side the Loans and Discounts kept pace with the state of the growth; that if they got a depositor's money

(Testimony of Emery Olmstead.)

and couldn't loan it they wouldn't make any money; loans were made by the Executive Committee. The actual loaning was done by the senior officers but the Executive Committee approved them; ever since the Bank was organized it was one of the rules that the Executive Committee should pass on all loans, and if they didn't like them they would reject them and recall the loan. Thereupon the witness was asked this question,

"Q. Can you explain to us what the fact is and how it came about, while this Bank was so developing and its officers were so attending to it as you have described, that it became necessary in the fall of 1926, as we have been told here, to have a special requested examination of T. E. Harris, to see whether or not you could form a new take-over company; and just tell me the facts now as thoroughly as you can. I am trying to get it, to cover the ground, without asking particular questions.

A. The Examiner about a year prior to that time had asked us to take out those items, those slow assets, in other words, and Mr. Price's argument was that we were using all of our earnings for the purpose of reducing those items, and he didn't think it ought to be necessary to levy an assessment, or to voluntarily assess ourselves to take them out, as long as we were not paying dividends; and that he didn't want to ask the Pittock Estate to put up any money for that purpose. In the spring of 1926, after Mr. Wylde's examination,

(Testimony of Emery Olmstead.)

Mr. Price changed his mind on that, and told me he would agree to put up their share if necessary, and take out those slow assets, so that we could go on a dividend paying basis. It was understood that we were to go back and see the Comptroller and agree with him on what was to be taken out. Mr. Price and Mr. Stewart and Mr. Metschan went back and had a meeting with the comptroller some time I think in May or June, 1926, and came home and reported that they had agreed with the Comptroller that they would take out any items, or any frozen assets, after a [490—156] special examination by Mr. Harris, the Chief Examiner in this district, which would take place in the fall: and whatever Mr. Harris agreed upon should be taken out the Comptroller agreed that he would approve of it; and that is the reason that special examination was made, to determine what frozen assets should be taken out of the bank.

Q. All right. Now, did that leave this accumulated so-called new business, was that all free and clear of any criticism?

A. Yes. I don't think we charged off a hundred thousand dollars of losses for loans made after 1921." (R., 859, 860.)

Then the witness further testified that a plan was made to organize a corporation and to put in $750,000 cash and bonds and assets for the balance up to $1,500,000, and the Bank would carry the bond, and that this was before the report of Harris of

(Testimony of Emery Olmstead.)

1926. The directors asked him to see all the stockholders and the witness was supposed to go to them and explain the plan; they didn't want to put it in a letter because it might get out and he had told Mr. Harris, and told the board that he would not be able to do it in probably less than six months and see them all and get the thing cleaned up; that he wanted six months to clean up those assets and that this was in the fall of 1926, which would bring it into the spring of 1927, about April 1st; that there was afterwards a proposition for a State Bank in February, 1927, after they had failed to raise the $1,500,000 and that this plan started after negotiations of the First National and the United States National failed, and from the time the loans were made and to the time they started to clean them up there wasn't a year that they didn't make at least $150,000, but the Bank had not paid dividends and this had reflected on the institution and reflected on its standing in spite of the fact that the Bank grew; that deposits are [491—157] really the business of the bank, the real earning power, but there was one very embarrassing thing to the Bank, that several times Mr. Morden offered the Bank for sale; he spoke to Mr. Price about it and said "Can't you stop Mr. Morden from talking to these brokers and circulating around among other brokers saying the Northwestern National Bank is for sale." Some of our best customers came to me several times and we lost good business because of that. Mr. Morden didn't seem to understand that

(Testimony of Emery Olmstead.)

he couldn't sell the Bank; instead of coming out and offering his stock for sale, he said he was offering the control, I could name several accounts we lost; many people said they didn't want to stay in a Bank when they didn't know where the control would go, and these things were very harmful to us. After calling the same to Mr. Price's attention several times he said he would call it to Mr. Morden's attention; the fact that we were not paying dividends and had frozen assets all reflected on our institution, but in spite of that we made about $1,400,000 and built our deposits up from fifteen to twenty million, and we used the $1,400,000 to charge off losses; that Morden's efforts to sell the Bank commenced as early as 1923; there was opposition in the sense of competition that affected the conduct of the institution; the Northwestern National Bank had to fight the Portland Clearing House constantly ever since the Northwestern was organized; that he did not know of any director who went out and tried to help out with that competition; these situations increased [492—158] after they moved from Third and Oak to Sixth and Morrison Streets, and right then naturally the other Portland Banks were trying to make it hard for the Northwestern; other Banks had called him up about Morden trying to sell the stock as early as 1924; that matters of policy of a business nature such as selling a Bank are not usually and ordinarily done without the directors knowing about it; that there had been no Executive Committee meeting or directors' meeting at which

(Testimony of Emery Olmstead.)

to his knowledge there had been any suggestion of selling the Bank; that after the turn of the year 1927 the condition had become worse because the Wheeler deals didn't go through and Wheeler couldn't take his share as a stockholder in the proposed organizations to take over frozen assets. In the latter part of January, 1927, there were detailed negotiations with the United States National Bank and also with the First National Bank for the sale and disposition of the Northwestern National Bank. Mr. Price first conducted negotiations with Ainsworth of the United States National, and afterwards with Elliott Corbett, who went to his house and represented the First National Bank; that the Bank's loans were exhibited, and also the Comptroller's report of September, 1926, to their competitors, the report made by Harris; that as to the suggestion of informal meetings of the board of directors there were such if there was some action taken. There was always a record made of it. Mr. Price called the February 11, 1927, meeting, and it afterwards developed that Jones, Skinner and Stewart were the three officers [493—159] who had explained the notes and note pouch of the Northwestern to the First National, and had made more loans in the last five years and knew more about it than any of the rest of us, and I thought they should be the ones to analyze and describe the borrowers to the proposed purchasing Bank; that this matter had come up in Price's discussion with the witness; that at that time the First National

(Testimony of Emery Olmstead.)

Bank insisted upon the proposition, about February 11, 1927, that the directors or stockholders put up two million cash as a guarantee on top of capital and surplus, but these deals brought out that these Banks knew all about our assets, they knew all about our weakness, not only the officers but the auditing department, and I called the attention of our directors to that serious situation.

Thereupon the following questions were asked the witness and the following answers given:

"Q. And what did the directors do or say about it?

A. Well, the directors then discussed what should be done, and we stayed there until about half-past eleven, or twelve o'clock, and I told the directors that some quick action would have to be taken; that rumors would start up, as sure as the world; this thing would get out, the public would know of it, and it would be impossible to stop it. And I suggested as a remedy, which had been suggested to me by Mr. Harris, that instead of putting up two million dollars guaranty to the First National Bank, to organize a state institution with two million dollars capital, take out these slow assets, which would be the offset to our Capital and Surplus of $2,400,000, and liquidate the National Bank and give the stockholder of the National Bank everything that was coming to him, and the subscribers to the new Bank, or State Bank, would be in position to make money on their capital immediately, because we had an earning power; we had an earning power of

(Testimony of Emery Olmstead.)

$250,000; and the directors seemed to think that that was a good solution. And I suggested that we adjourn to meet that night and think it over in the afternoon; that something must be done quickly. We met over in Mr. Price's office in the Oregonian Building, and the same directors were present. [494—160]

Q. This is the evening meeting?

A. This is the evening meeting, merely an adjournment. We met in the Oregonian Building, the same directors were present, and Mr. Price said that he thought that was a good plan to organize a new bank, and he assumed the responsibility of subscribing for the Pittock Estate, subscribing liberally to this new stock; and the stockholders or directors who were there, all those who could, subscribed. And then finally—when I say subscribed I think Mr. Metschan—Mr. Hart was there at the time—

Q. Mr. Hart sitting in the room here?

A. Yes; and I think Mr. Metschan asked each one what they could subscribe, and put it down, and when they added it up they had practically $2,000,000 subscribed, $200,000 surplus, paying it in at $110.00 a share. Mr. Stewart was asked to see Mr. Bramwell, the State Bank Examiner, that night—we felt it that important—and secure from him a charter to be called The Northwestern Bank. And Mr. Stewart called Mr. Bramwell's home at that time.

Q. From that room?

(Testimony of Emery Olmstead.)

A. From that room. It was perhaps about ten o'clock and they told Mr. Stewart that Mr. Bramwell would be home later in the evening; but Mr. Stewart was to see Mr. Bramwell and have the charter ready by the next night—or the next afternoon, which I think was on February 28th. The same directors, I believe all of them were present at this meeting; and at the opening of the meeting Mr. Price said he had decided that he would not carry out the plan. Instead of organizing a State institution he was quite satisfied that he could go to each one of the stockholders of the Northwestern National Bank and get them to put up their $37.50 a share, and take out these frozen assets; that he didn't want to give up the National charter, and he thought that we were strong enough to withstand any rumors that might come from it. I had met Mr. Price downstairs before the meeting; I had heard of his decision, and I told him he was making a mistake, and I said I am going to tell the directors what I think about it. He says, Now don't scare them.' I said, 'I won't scare them, Price, but I have had experience,' and I said to the directors at that time that if they didn't follow out this plan, organize this new Bank and show strength instead of weakness, that the Bank was gone.

Q. Now this was before you had resigned as president?

A. That was before I had resigned. I said that I was in a Bank in Minneapolis when I was a boy,

(Testimony of Emery Olmstead.)

when they had a run, and I knew what rumors meant, and I knew what it means to stop them; and if it got out that we had $1,600,000 of slow assets, or more, if it got out we were negotiating with the First National Bank and had failed to make a deal with them, it would be a reflection on us and on the Northwestern National Bank, and that something had to be done, and done immediately to save our business for our customers—for our stockholders; and that if they were not going to carry out this plan, and if they were going ahead to try to effect this other organization, which would take maybe two months, that I was through for all time, and I handed in my resignation and walked out of the room." [R., 883, 886.) [495—161]

The witness then testified,

Q. Well, we had Mr. Lindner on the stand, and in order to connect your narrative with that transaction he said he believed he talked to you or Bates; I wish to be certain if he talked with you in January, 1927, about his hundred shares. A. Yes, sir.

Q. And he said that some statement—I am trying to quote it correctly, but if Mr. Hart stops me please don't answer—that he believed that you had told him, or that he learned it from the transfer that was made afterwards, that Mr. Pittock would purchase stock at $120.00 a share, and he sold fifty shares of it, as he remembered, to Mr. Pittock; and some other shares either through you or Mr. Bates, he thinks, to a broker. Now, do you know anything about that transfer? A. Yes.

(Testimony of Emery Olmstead.)

Q. I am not talking about the record of the transfer of stock; talking about the real deal, if you know it.

A. Yes; Mr. Lindner had been in prior to that time and said he would like to sell his hundred shares of stock, and when Mr. Pittock authorized us to buy some stock for him at $120.00 a share, I called Mr. Lindner over the phone and he said he had sold part of his, but would be glad to sell the balance of it at that price; and the sale was consummated.

Q. So it was to you that he talked?

A. Yes, sir.

Q. Do you know what the fact is concerning the purchase of this Bank stock at that time?

A. Well, as I recall it, Mr. Price told me that some of the Pittock heirs would be willing to buy some more stock at this price, so that they, with the trustees, would have control of the Bank.

Q. In connection with the stock held by Morden and Price as trustees?

A. Yes, sir.

Q. Of the H. L. Pittock Estate?

A. Yes, sir." (R., 888, 889.)

The witness then testified that after the purchase by Wheeler of the Menefee-Standifer stock it was disclosed that Wheeler was considerably indebted to the United States National Bank of Portland, the Bank of California and other clearing-house Banks of Portland, and eastern Banks, and in such manner that if Wheeler went to any Bank to negotiate a loan or transaction it became known to an

(Testimony of Emery Olmstead.)

affiliated Bank and the entire relation became disclosed, and that caused trouble to the Northwestern National; and along about the 9th of October, 1924, [496—162] the board took cognizance of the relation of Wheeler's loans for the first time, while the witness was away. Then Wheeler was also identified as a director of the Lumbermens National, which was acquired by the United States National Bank of Portland by means of a sale and that Wheeler, Pittock and the witness had purchased over one-third of the Lumbermens National Bank with the expectation of taking it into the Northwestern, and it came about that the United States National had to buy this interest from Wheeler before they could make their deal; that loans commenced to Wheeler as early as he purchased "The Telegram" originally from "The Oregonian," and then it came about that there were offers made for the purchase of "The Telegram," and this continued along until the offer was rejected, and that the time fixed was after the examination in the fall of 1925 and the price was $900,000; that Olmstead urged Wheeler to sell the paper so that the Bank would get the money, and that Wheeler then consulted with other directors, and they would not back the witness up in forcing the sale of "The Telegram," and that the witness could not get any support from the board in forcing Wheeler to do what the witness thought would get the Bank money, and although Mr. Morden was not a director of the Bank at that time yet as a Pittock trustee

(Testimony of Emery Olmstead.)

and manager of the Pittock estate in connection with Mr. Price he dictated the policies concerning the sale of "The Telegram" and directly expressed to the witness that he did not want the sale of "The Telegram" aforesaid, and that the witness then explained to Mr. Morden that the Examiner had asked for a reduction of the Wheeler lines, and that the sale [497—163] of "The Telegram" would be an opportunity to do so, and that Morden replied that he regarded Wheeler as perfectly good; and although Morden was not a director he remained active and in touch with the affairs of the Bank and offered suggestions and influence about them all along from the time he resigned up to and until the witness resigned in 1927, and this related to other things than the Wheeler loans and the general affairs of the Bank and to the Leadbetter loans, and the sale of the Pittock stock and the effect upon the Bank of that getting out; that the directors always listened to the representatives of the Pittock estate because they considered the Pittock estate in control of the Bank; that after the Fleischhacker deal for "The Telegram" had been opposed the witness renewed the Hearst deal for "The Journal" to buy "The Telegram," and then Price came to him about the time these negotiations were being closed and told him that they would rather have "The Telegram" go to Hearst than to "The Journal" because if it went to "The Journal" it would increase its circulation to a point in excess of "The Oregonian"; then after the witness resigned as president Price

(Testimony of Emery Olmstead.)

had shown him a telegram from Wilcox suggesting another purchase of "The Telegram" with an offer of some Eastern bank and the Anglo Bank to put up enough money to carry "The Telegram" until April 15th, but Mr. Price stated he would not agree to advance any more money.

"Herbert Fleischhacker, of San Franicsco, requested an option on the Portland Telegram in December, 1925. The witness assumed but did [498—164] not know that the option was desired for the Hearst interests. Fleischhacker stated that he had a purchaser for the paper and wanted a thirty day option. Mr. J. E. Wheeler refused to sign such an option and he was not forced to sign.

"Within six months thereafter said J. E. Wheeler did sign an option for a smaller figure running to the witness but for the Hearst interests. Thereafter the Hearst interests made a thorough investigation of the paper, obtaining an extension of the option to a date in August, 1926, and then declined to exercise it.

"At about this time a sale of the paper was negotiated to the Oregon Journal and the deal reached the point of actually signing papers, but at the last moment Mr. Wheeler declined to sign." [499—164–a]

*[These] transactions became ascertained and discussed in the Executive Committee of the North-

*NOTE: Correction by Clerk U. S. Circuit Court of Appeals.

(Testimony of Emery Olmstead.)

western National Bank; then the witness was questioned and gave the following answers:

"Q. What I had direct reference to, is whether yourself and the associate directors, or Executive Committee— I don't know which way it was. Which way was it? You mean in the whole Board, or with the Executive Committee?

A. You refer to this discussion?

Q. No. I am referring to the condition of Wheeler's affairs in these other banks shortly after the time you say Mr. Wheeler borrowed money to buy this stock, I understood you to say.

A. I just explained. We knew—the Executive Committee knew and our bank knew, our competitors knew, that Wheeler had lines in San Francisco; we knew he was borrowing money there; we knew he was borrowing money in Seattle and other places; and Wheeler came to me and told me that the fact that he had bought this particular stock and borrowed money of one of the banks in San Francisco, the Anglo Bank, to pay for it, which required $630,000, that had gotten to his corresponding banks in San Francisco, the Crocker National Bank and the Mercantile Trust Company; after they found out that he had borrowed money to buy the bank stock, they cut out his line of credit.

Q. Was that matter brought up and discussed between you and your Executive Committee in your own Bank here?

A. At various times it was discussed, because

(Testimony of Emery Olmstead.)

Wheeler's lines were being reduced in other banks." (R., 920.)

When asked what the "Wheeler Lines" consisted of the witness said:

"The lines consisted of J. E. Wheeler, personally, Telegram Publishing Company, Wheeler Estate, Wheeler Timber Company, the McCormick Lumber Company, all of which were guaranteed personally by J. E. Wheeler, and then L. R. Wheeler had a line of credit independent. J. E. Wheeler did not endorse that or guarantee it, and those lines, including L. R. Wheeler, ran into about $600,000." (R., 922.)

Thereupon the witness was shown Complainant's Exhibit 2 consisting of the McCormick ledger account commencing March 29, 1926, and asked whether that recorded the transactions in and out of the [500—165] McCormick Lumber Company with the Bank and he said that it did, then he was asked these questions and gave the following answers:

"Q. That same record will have correspondingly on it, will it not, both checks that went into the depositor's account and were credited, as well as the checks that came in transit and came back unpaid?

A. Yes, sir.

Q. And ultimately carried as Cash Items?

A. Yes, sir.

Q. Isn't that true? A. That is, true." (R., 924.)

(Testimony of Emery Olmstead.)

The witness then testified that any department carrying cash items or bills in transit carried those items specifically and they could be seen and indicated in any one department at any time, daily and monthly; that it was with the ruling of the Court that there was no controversy about it stipulated with as to the McCormick photostat statement sheets the "OD" on the ledger sheet was equivalent with the "OD" on the statement. The witness then testified that in 1924 in the transactions with the Wheeler business, checks and drafts, that Skinner and Stewart handled the matter along with him, and it was not done in any different way in 1926 after it started in March, 1926; that it was in July, 1926, that he knew for the first time that checks in any volume were coming back and that he then called Mr. Price into his room and told him about it. (929.) That they discussed the amount of them and he told Price about it as Chairman of the Board, and that the total at that time when he and Price first discussed it was something like $200,000 (930); that he fixed the time as some time in July or the first of August; at that time Price and himself were informed that Wheeler [501—166] expected to get money from the Detroit Trust Company, and a few days later he informed Price that Wheeler had failed to get the money from it; that some time in August or September after these talks with Price, Price had said that Wheeler must get the money to take up the checks, and the witness had told him that every-

(Testimony of Emery Olmstead.)

thing was being done, and that Wheeler said that he would take them up as soon as he had made sales of either "The Telegram" or the redwood tract; that Wheeler's condition was understood and discussed right along with the Executive Committee (933); that there was no time when any director or officer who wanted to know the exact and precise situation of the Wheeler relationship with the Bank that he could not have ascertained it. The witness admitted that he had had the transactions with Ballin shown by the correspondence and exhibits hereinbefore recited; that the witness had during four successive years visited the Comptroller's office, with the knowledge of the directors, about the condition of the Bank, and had informed the Board upon his return in each instance and made known to his fellow-directors that the Comptroller insisted upon a more vigorous policy, but that immediate change of management had never been discussed with him at all. The change of management had come up in a letter from the Comptroller but the board of directors had never discussed it with him, and that no director or member of the Bank prior to February 28, 1927, had ever asked him to get out.

The witness was then asked under the conditions portrayed by his testimony what was usually [502—167] done in a Bank to meet the then situation as he then saw and knew it in the city of Portland at that time, and the Court refused to allow this question to be answered in form. The

(Testimony of Emery Olmstead.)

question was changed several times but the Court ruled it was not proper for this witness to give any expert opinion or to state any answer to such a question. Then the question was framed in this form and the following answers and proceedings had:

"Well, do you know if they did anything? Put it this way: Do you know if the directors did anything and if so, what, after you left them—

Mr. HART.—Unless the witness participated and knows, it is not fair to ask him. He was out of the management of the bank.

Mr. BRISTOL.—I asked if he knew.

Mr. HART.—What he may have learned?

COURT.—No, what he knew himself. Not what he learned of somebody else.

Mr. BRISTOL.—I asked him if he knew what the directors did after he went out?

A. No, I don't know anything about that.

Q. Were you told or informed about anything they did, up to the 29th of March?

Mr. HART.—He just said he didn't.

COURT.—By whom?

Mr. BRISTOL.—Anybody.

COURT.—On the street, rumors on the street?

Mr. BRISTOL.—No, I mean directors or officers of the Bank.

Mr. HART.—They can best testify as to what they did.

Mr. BRISTOL.—I think the declaration against

(Testimony of Emery Olmstead.)

interests can be made at any time, id any such declaration made.

Mr. MAGUIRE.—You should ask, if that is what you are trying to do, you should ask about the specific directors.

Mr. BRISTOL.—I want to find if anything said, first, then I can go to specific.

A. Yes, there was.

Q. From whom did you learn it, and when and where?

A. Mr. Stewart told me, that is all I know about it.

Q. And when did he tell you that?

A. I called on him one day right after the closing of the Bank. He said that the run had started about a week previous to the closing, in the savings department.

Q. And did he tell you anything about what the directors had done concerning that matter?

Mr. HAMPSON.—That would not be binding on anybody.

Q. Did he say what he did?

A. No, he didn't discuss that.

Q. Now, did you learn from any director other than Mr. Stewart, what had been done? [503—168] A. No, sir.

Q. A paper was produced here purporting to have your signature to it, to an arrangement between the directors, some of the directors, maybe all of them, and the First and United States Na-

(Testimony of Emery Olmstead.)

tional Bank, as between them and Mark Skinner and O. L. Price and C. A. Morden, trustee. Was that ever explained to you? A. No, sir.

Q. The paper that was shown here purported to bear your signature thereon. How did that come up?

A. Well, Mr. Kerr or Mr. Kerr's office, called me, and wanted to see me, and he said, "Emery, I want you to come down to the Security Savings & Trust vault room."

Q. What time was this?

A. It was after the closing of the Bank.

Q. After the closing of the Bank? A. Yes.

Q. And can you tell the Court how long after the closing of the Bank?

A. Well, I think—I don't know exactly how long after it was; perhaps a week.

Q. You don't know how long it was after?

A. I think a week or ten days anyway; maybe longer.

Q. And you signed this paper then where?

A. In the vault room of the Security. And I said to Mr. Kerr, I said, "Jim, you know all about this: I am not reading this." "No" he said, "this is just agreeing to transfer the assets to the banks, to those two banks." And I signed it, and that was all there was to it.

Q. Were you informed, or did you know, by Mr. Kerr at that time that that did, or did not, involve a bargain and sale of assets and the assumption of the liability by these two banks, the First National

(Testimony of Emery Olmstead.)

Bank and the United States National Bank of Portland.

Mr. HART.—That is objected to as leading. The witness has stated what was said; if anything else let him say so.

A. Nothing more said between Mr. Kerr and myself.

Q. Prior to the time you so signed, or any time prior to March 29th, can you tell me if there was any assembly of the stockholders of the Northwestern National Bank?

A. I don't know whether there was or not.

Q. Well, you didn't attend any, did you?

A. No, sir.

Q. Do you know of any call of meeting therefor?

A. No, sir.

Q. You still remained a stockholder, and are still one now, aren't you? A. Yes, sir.

Q. Did you get any notice of one, I say of a call meeting of the stockholders?

Mr. HAMPSON.—We will admit no formally called meeting of the stockholders except as shown by the records.

Mr. LOGAN.—Admit no call.

Mr. HAMPSON.—No formal call for stockholders' meeting except as disclosed by the records.

Mr. BRISTOL.—From March 29th.

Mr. LOGAN.—They are all in evidence.

Mr. BRISTOL.—Then I understand what you mean, Mr. Hampson, do I get this precise as between you and Mr. [504—169] Hart, that both

(Testimony of Emery Olmstead.)

of you stipulate that there was no called deliberate assembly of the stockholders after January 11, 1927, until the meeting that appears in the record of May 3, 1927. Is that right?

Mr. HAMPSON.—I can't exactly say were no stockholders' meetings. I said that no stockholders' meeting was called in the manner provided for by the by-laws except as the record of such stockholders' meeting appears in the record-book which is already in evidence.

Mr. BRISTOL.—You agree with that, Mr. Hart?

Mr. HART.—Yes, I go further; I will say was none between the dates you specify; the record so indicates.

Mr. BRISTOL.—Mr. Hampson, don't say that.

Mr. HAMPSON.—I will go further than that; I have no doubt that the stockholders met and discussed the affairs of the Bank but not called as provided by the by-laws to make what would be technically called a stockholders' meeting." (941–945.)

Q. Now, the attempt of the warning to your own board of directors has all been testified to; you had some own reason, in your own mind, for giving that warning? A. Yes, sir.

Q. All right. I ask if you knew whether or not, and communicated to your Board, or whether they came to know that this information which involved the private and confidential matters of your own Bank, prior to February 28th, had been disclosed?

(Testimony of Emery Olmstead.)

A. I told them it would be disclosed.

Q. In connection with this matter that I asked you concerning the competition and competitive bank situation, I overlooked just one question: Was any application to your knowledge or that of your directors, ever made to you to participate in the Columbia Basin Wool Warehouse transaction, and did you or didn't you refuse to do so?

Mr. HART.—Objected to as wholly immaterial and foreign to any issue in this case.

Q. I want to know, Mr. Olmstead, what the fact is, if the Columbia Basin Wool Warehouse transaction, generally known in this town, had any effect on competitive relations of your Bank to the Clearing House Banks? A. Yes, sir.

Q. Now, you may state to the Court when about it took place?

A. Why, Mr. Ainsworth who was vice-president of the Columbia Basin Wool Warehouse, came to me and wanted us or our Bank to take $250,000 of their paper. I told Mr. Ainsworth we didn't approve of the way they were loaning their money on sheep and wool, and that we wouldn't carry it. He said we ought to do it as a matter of duty to the community, to help that corporation; I told him that we had sheep companies and wool companies we were carrying, and we felt we were doing our part; and he was more or less put out about it.

COURT.—What is the purpose of that character of testimony; to show that this bank failure was due to other banks, activity of other banks?

(Testimony of Emery Olmstead.)

Mr. BRISTOL.—It is alleged in the bill—[505—170]

COURT.—I am not asking what is alleged in the bill. I want to show what is the purpose of this testimony.

Mr. BRISTOL.—The purpose of it is to show the connection, physical connection, as the competitive fact, between these three banks, so that when there was disclosed to Mr. Price and these other gentlemen what came to be known as a general proposition to remove the Northwestern National Bank from its function as a financial institution in this community, it was up to these directors to recognize and know and act upon it.

Mr. LOGAN.—How could the directors themselves be blamable for enemies outside the Bank?

Mr. BRISTOL.—Not a contention of blamable.

Mr. LOGAN.—What are you suing for if not blamable. I don't understand and nobody else undertsands your bill.

Mr. BRISTOL.—All right." (941, 949.)

Thereupon this question was put to the witness:

"Q. Can you tell me how it was, if the Bank was an unusual success, as you described it to Mr. Hart, and in excellent condition that within twenty-nine days from that time it closed its doors?

A. I can only state the precautions that I would take, your Honor.

COURT.—I don't think that is proper.

Q. That is not the question, Mr. Olmstead. Can you state any specific thing that was discussed to

(Testimony of Emery Olmstead.)

be done by anybody, with a bank which you say was then an unusual success and in excellent position, with respect to the observed fact that it closed on the 29th of March?

Mr. HART.—Are you asking him for the years, up to the time he left?

Mr. BRISTOL.—Yes; covered by your cross-examination; if he heard anything discussed by anybody.

Mr. HART.—He covered that very fully.

COURT.—That anybody might be people on the street, rumors on the street.

Mr. BRISTOL.—I mean board of directors; I mean anybody in the Bank there, before you left the room.

A. At this directors' meeting?

Q. Yes.

A. There was nothing discussed there at all that would—no plan was discussed to safeguard the Bank's interests after this information was out.

COURT.—What information do you refer to?

A. The information that we had given out to other banks, regarding the Comptroller's reports and criticisms. The only thing that was discussed—the principal thing that was discussed, was organizing a new corporation in order to take out these slow assets; these slow assets that we all knew should come out; and it was either through the organization of this separate corporation, or the directors voluntarily assessing themselves 100%." (962,964.) [506—171]

(Testimony of Emery Olmstead.)

The witness was then asked this question:

"Q. You say even including what was denominated as the Wheeler transaction, there was actually to impairment of the Capital, Surplus and Undivided Profit, and that if this two million dollars had been put in the Bank would have been in excellent condition and unusually prosperous?

A. Yes, because it would have eliminated those frozen assets that the Comptroller was criticizing. He didn't criticize them as losses, you understand, or even doubtful, in some cases; some of them were doubtoul in his mind, but they were frozen. They were securities that we had taken for debts contracted that we hadn't realized on, and we couln't realize on it without a great sacrifice.

Q. Each successive director as he came along in his course of conducting that bank, dealt with these things just as you did, didn't he?

A. Yes, sir; those things were discussed at nearly every executive committee meeting, or at least every time a renewal note came up the subject was brought up, which was at least every ninety days, sometimes every thirty days. I had special reports on them, and sent to the appraisers to appraise the property, and all those things. They knew all about it." (R., 971, 972.)

TESTIMONY OF ELLIOTT R. CORBETT, FOR COMPLAINANTS.

ELLIOTT R. CORBETT testified concerning the times he met Price in February, 1927, and of the details concerning the transactions between Price, Skinner and Stewart, and talks with Ainsworth about the sale of the Bank as heretofore explained by other witnesses, and the notes and everything of the affairs of the Bank were disclosed to them, and they wanted to find out whether there were sufficient assets at that time to offset the liability of the Bank; they actually wanted an accounting and there was a guaranty at that time of about two million. This was about the 19th of February, 1927, and that was made a condition by the two banks, the First and the United States National, before they would take the so-called assets; and that the same report of conditions that he saw and heard on or about the 28th of March, 1927, was the same report that was made to Mr. Ainsworth and Mr. Dick of the United States [507—172] National Bank, who were at that time with him waiting the report of the auditors on the 27th or 28th of March, 1927, in the Northwestern Bank Building.

TESTIMONY OF —— GRIGSBY, FOR COMPLAINANTS.

GRIGSBY as a witness testified of the demand made upon Skinner and the directors on behalf of the respective complainants before suit.

TESTIMONY OF J. C. AINSWORTH, FOR COMPLAINANTS.

J. C. AINSWORTH testified that he was president of the United States National Bank of Portland, Oregon, at and during the times covered by the evidence and had been in the banking business in Portland, Oregon, since 1893; that propositions had been made to him in the year 1923 and at later times and in 1927 for the purchase of the Northhwestern National Bank and its deposits; that the first time was when Mr. Morden and Mr. Menefee came to see him; that at the time the first proposal was made to him for the sale the deposits were around eighteen or twenty million, and at that time Mr. Olmstead was East; that after deducting the deposits for public money they figure not less than three and up to five per cent as the value thereof to the business, and that the things that would enter into the elements of the terms of value would be the condition of the paper of a bank and its good will. The amount of deposits and their value is affected by the equivalent amount of loans on the other side, having regard to whether the

(Testimony of J. C. Ainsworth.)

loans and discounts are sufficient to pay the deposits and, if not, somebody has to put up for it, and if the capital, surplus and undivided profits were wiped out that would confront [508—173] the Bank's real value; that in March, 1927, they were all night long going into the loans before the Bank suspended, working with a crew of men to analyze as far as possible the value of the assets, and it was discovered that all the capital, surplus and undivided profits were short by about two million of paying the deposit liability; they found that it would take all the Bank's capital, surplus and undivided profits at an even two and one-half million. 100% assessment in addition meaning two million more or four and one-half million, and that to reinstate the capital, surplus and undivided profits would require two and a half million more which would take about seven million dollars, because there were several millions of dollars frozen assets (226); that the million dollar notes, two of them each, were involved in the transactions with his Bank and the First National, and were treated as cash because Mr. Price delivered the equivalent in bonds; that his Bank and the First National didn't take the notes but took the actual bonds, and after the deposits were all paid why then there was to be turned back to Price and Skinner the pledges. That application was made to the Clearing House Association of Portland, Oregon, on the 28th of March to guarantee the deposits but that was declined. There had been general withdrawals of the Bank's

(Testimony of J. C. Ainsworth.)

funds for several days before them, and Mr. Chas. H. Stewart, one of the directors, had told him that he would not open in the morning.

The examination made by the United States National Bank and First National Bank, jointly, was made during the [509—174] night before the day on which the Bank suspended. The work was done during the night for the purpose of determining, so far as possible, the value of the assets in view of the fact that a demand for all of the deposits was made since the disturbance had already started and it was necessary to be prepared to pay off all deposits of eighteen million dollars beginning the next day. The effort was to get the immediate value because there was an immediate demand for cash. The next day the United States National and the First National together put up practically eight million dollars. It was known that there would be a demand for all the deposits because depositors were in line at seven o'clock in the morning; and the examination that was made was with that thought in mind.

On cross-examination this witness testified that the figure that specified as the price for [510—174–a] the control of the bank stock was $150 a share when Mr. Price began the negotiation; That the United States and First National Banks together put up practically eight million dollars on the 29th and 30th of March, 1927; that on subsequent liquidation greater values had been realized

than those placed on the assets at the time the examination was made March 28, 1927.

TESTIMONY OF PAUL S. DICK, FOR COMPLAINANTS.

PAUL S. DICK testified that he was one of the officers of the United States National Bank and that the first negotiations of sale of the Northwestern was February 24, 1923, and at that time Mr. Menefee urged his continuance as manager of the bank in order to hold the business, and the next time there was any negotiation familiar to the witness was March 28, 1927, fixed as the time, shortly before the run on the Northwestern; he thought that the time of Mr. Price's suggestions of sale of the Bank was three days before March 28, 1927, but was not certain whether it was before or after Olmstead resigned; that the proposition was that Mr. Price thought the United States might be interested in buying the assets of the Bank providing an offset in negotiable securities and cash could be offered, and the building was discussed, and at that time Mr. Price gave them figures representing their status of notes receivable. The witness was then shown Complainant's Exhibit 30, and asked whether that contained the figures of the published statement of the Bank that he received from Mr. Price, and he stated that Price had given them the figures from the report of the National Bank Examiner, from T. E. Harris, in the report [511—175] of

(Testimony of Paul S. Dick.)

March 5, 1927. Mr. Hart then stated that he thouht Mr. Dick's recollection as to the report must be mistaken because the conference with Price and the United States *Nation* was at a time before Olmstead was out of the Bank and, therefore, the Harris report referred to by the witness must have been the one of September, 1926, and the witness then corrected his testimony. There were two conversations, however, one with Mr. A. L. Wright, the vice-president of the United States National and the other one was with Mr. Ainsworth, the previous witness and Dick. Mr. Price was alone but he read from the Examiner's report; that was before Mr. Wright, the witness, Mr. Tucker and Mr. Ainsworth. The stock ownerships of the Bank were discussed; that the witness had learned that G. K. Wentworth had represented an option also on the stock of the Northwestern National Bank some time prior to the time when Price came to see him. At this time they had learned that the First National Bank of Portland had already been consulted about a deal, but the witness was quite sure that the proposal made to them was not discontinued for that reason; that a meeting of the Clearing-house Association was held in the afternoon of March 28th in the directors' room of the First National Bank but nothing was done, and the meeting adjourned until 8 o'clock that night, and Price then returned to the meeting with Mr. Skinner and Mr. Stewart. A clearing-house conference then ensued and the clearing-house banks did not act and it was decided that

(Testimony of Paul S. Dick.)

the officials of the First National Bank and the United States [512—176] National should examine the Northwestern National Bank with the idea of guaranteeing payment of deposits providing the status of the Bank seemed to warrant such action.

That on the morning of March 29th there was a review of the findings, officers and officials of all banks being present, and then came about the arrangement that developed in the United States National and the First National taking over the Northwestern Bank; that taking complainant's exhibit 30 as then indicative of the capital, surplus and undivided profits, $2,521,676.17, the discovered losses would wipe out the entire amount; that it would have taken $6,400,000.00 cash to have reinstated the Bank's condition at that time; that Elliott Corbett had talked to him about the figures that had been presented to the First National during the time of the negotiations with that Bank for its sale; Mr. Corbett quoted the figures and he discussed them with Mr. Mills.

On cross-examination this witness testified that the way they arrived at their figures was to qualify the different paper according to its goodness, and that which was not quite so good, with a graduation downward so that there would be some paper which was considered worthless; that there had been a very unexpected liquidation since in its yield. The process they used to determine the status of the

(Testimony of Paul S. Dick.)

Bank was just the same whether it would have been for a purchase or to protect it with its depositors, and what they were trying to arrive at was whether the [513—177] First National or the United States National would be protected for any money they put up. In analyzing the paper they had the judgment, knowledge and skill of the officers of the Northwestern National Bank as well as the officers from both the other Banks, and the discussion of values proceeded from these three sources, and gave a very good opportunity of determining the values of the things they were dealing with. There was no effort on the part of anybody to depreciate the character or value of paper, but only to ascertain the real facts. The book value of a Bank's stock is ascertained by taking the capital, surplus and undivided profits and add them together and divide by the number of shares; that is the true real book value; that loans and discounts have to be examined in relation to the deposits from the standpoint of a loss itself becoming a deposit, or on the other hand a credited deposit becoming a loan.

The examination made on the night of March 28, 1927, was for the purpose of ascertaining what assets were available for the payment of all depositors in cash. The examination was concerned chiefly with what was available for immediate use.

Thereupon Complainant's Exhibit 51 was offered in evidence consisting of the published statements for each successive date from September 15, 1922,

(Testimony of Paul S. Dick.)

to and inclusive of the printed statement of March 23, 1927, of the Bank's resources and liabilities.

Thereupon DICK continued his testimony and the daily statement book was shown the witness, the same book [514—178] that the other witness testified about, and Transit Items, bills in transit and Cash Items were exhibited to the witness, and in connection therewith the white sheet designated "Computation of reserve to be carried to the Federal Reserve Bank," and the witness testified that the daily statement as shown him was intended to reflect the Bank's [515—178-a] actual condition and the figures and items would show the position of the Bank in the morning following completion of those figures, and disclose the amount of balance the local Bank would have with its correspondents, the amount that it had with the Federal Reserve Bank, the amount of cash that the Bank had on its own counters to do business with that day, the amount of items in transit, sundry bills and bills in transit, the amount of uncollected items or Cash Items and if Cash Items went out and what was called the ledger teller would have to show in his figures the amount of items that had been returned unpaid and for which the Bank had not realized upon, and those Cash Items together with the cash would have to be considered together on that particular morning to inform any officer looking at it what the condition of his Bank was, but that Cash Items as shown on the sheets would not count as legal reserve of the

(Testimony of Paul S. Dick.)

Federal Reserve Bank (780), but they would have to be included in the figures with the general bookkeeper showing the status of the Bank in order to arrive at the cash.

TESTIMONY OF CHARLES A. BURCKHARDT, FOR COMPLAINANTS.

CHARLES A. BURCKHARDT testified that he was one of the complainants; that he had paid June 25, 1918, $31,250.00 for 250 shares of stock of the Northwestern National Bank; that he had received a letter, exhibit 53, from O. L. Price, vice-president dated December 1, 1921, and the meeting that was to take place was to specially consider the increase of the capital stock, and then exhibit 54 was introduced. These were followed by the letters from Burckhardt to Olmstead and Olmstead to Burckhardt, concerning [516—179] the relationship to take more stock at the price of $150 a share; and them Exhibits 56 and 56–A were offered in evidence of May 1922, followed by Exhibit 57; and thereupon the witness wrote Phil Metschan, one of the directors and defendants, the letter of March 25, 1925, marked Exhibit 58, and in connection with that letter the latter of Olmstead addressed to Burckhardt and his reply, Exhibits 59.

The witness was thereupon shown a paper offered and received in evidence like the foregoing exhibits and numbered 60, which he said he talked over with Mr. Skinner, Mr. Olmstead and Mr. Metschan, and

(Testimony of Charles A. Burckhardt.)

that Mr. Skinner had told him there was a movement on by the Pittock Estate to get control of the bank and to sell it to the First National Bank, and they wanted to prevent that and that was the reason that he had signed the agreement and that he had discussed the matter with Metschan before he signed it, who had told him that he (Burckhardt) could sign it but that he (Metschan) would not sign it.

The witness' attention was called to the date February 25, 1925, written in Exhibit 60, over the date April 1, 1925, and this exhibit purported to limit each signer not to sell or transfer his shares or any other shares he might have acquired to any person not a party to the agreement unless a majority of those signing it should consent to the sale; Wheeler, Olmstead, Collins, Skinner, Stewart, McDougall and J. O. Elrod being the signers in the order named, reference being had to Exhibit 60; that he had discussed with Mr. Metschan the affairs of the [517—180] Bank and the Dufur Orchards, and that Metschan admitted they would have to take a loss, and that Metschan had told him he didn't have any confidence in Mr. Wheeler.

The witness was always assured that the Bank was in good condition by his talks with Olmstead or Metschan and Skinner, and on March 2, 1926, Metschan wrote him a letter and it was received and offered in evidence as Complainant's Exhibit 61, and on March 4th the witness again received a letter in 1926 from Phil Metschan, and in reply to it March 6th, both were received in evidence and

(Testimony of Charles A. Burckhardt.)

marked Exhibits 62 and 62–A, and during that period the witness was in Portland almost every week and afterwards coming down occasionally during 1926; that some time in these visits he had a talk with Mr. Metschan and was told that they were going to organize a new company with a capital of $750,000, and there would be an assessment against the stockholders of the Bank of $37.50 a share, to take out some of the slow assets in the Bank that the Comptroller wanted taken out. This was after the letter of March 4, 1926, and his reply thereto; that he received a letter from Olmstead November 4, 1926, and replied thereto (Exhibits 63 and 63–A, and received an answer to his letter and made a reply thereto (Exhibits 64 and 64–A); and then he had a talk with Olmstead and Olmstead told him that he thought he could get $120 a share for his stock but nothing was said by Olmstead of the visit of T. E. Harris, Bank Examiner, in September, 1926, nor to ascertain if Skinner had said their assets were enough to make a new take-over company. [518—181] That the witness had generally seen all the officials when he came down but there was nothing said about that matter; that the witness came down before the stockholders' meeting January 11, 1927, and saw Mr. Metschan and he left his proxy here and went back to Seattle, that was Saturday, January 8th. Metschan then told him that the matter of making a new company would come up and the $37.50 share matter at that meeting but did not tell him that anything had been previously done in

(Testimony of Charles A. Burckhardt.)

the Bank that would come up at that meeting but he was not told that he would not be required to act upon any previous transactions as a stockholder. In order to show the relation of proxies and the giving thereof, and the receipt*ion* of the same, the letter of McNary, the proxy, to the witness was placed in the record but ruled by the Court not to be competent evidence against any defendant but filed as a reference in the record relating to this proxy and for identification it was marked Complainant's Exhibit 65 and 66. That Metschan had called him up on the telephone in Seattle at his house after this stockholders' meeting and just prior to the time that Olmstead retired as president of the Bank, and asked him to come over to Portland as there was a crise*s* in the Bank, but the witness could not catch the train but he called him back the next day and said that everything was fixed up, and said it wasn't necessary for him to come over. No details were given. Metschan had told him early in 1926 at the time of the offer of $120 a share that he didn't think that the stock should be sold, that the Bank was in better condition than it had been for a long time. Before the Bank [519—182] closed he came down several times and on one of these occasions he saw Mr. Metschan and Mr. Price, shortly after he became president of the Bank, and he explained to the witness what these crises were about. Mr. Price then told him about the offer to the First National, and that was the first the witness had learned of it. This was shortly after Mr. Price became

(Testimony of Charles A. Burckhardt.)

president when witness came over and found out what it was all about and Olmstead went out and Price went in; that there had never been any previous indication of change from anybody.

Thereupon Complainant's Exhibit 67, 67–A and 68, the latter being the letter of November 2, 1927, to Skinner, were then offered in evidence; that the witness had received statements of the Bank from time to time identical to the ones published in "The Oregonian" and from what he saw and received there was nothing indicated which showed anything wrong with the Bank.

On cross-examination this witness testified that he had received the paper first through Mr. Skinner. He had come over to sell his stock for $140 a share, but found out about this pooling arrangement was on and he had no opportunity to sell his stock; the first time he saw Exhibit 60 it had three signatures on it, Wheeler, Olmstead and Collins, and the witness signed next. Mr. Skinner kept the paper after witness had signed it; he found the paper several months before trial in his papers in Seattle and had sent the paper by mail down to his counsel, or brought it over in person; that all he could say about the document was that he recalled [520—183] when he signed it but couldn't remember what happened afterwards; that he was absolutely a blank. Thereupon the following proceedings took place on the cross-examination of this witness by Charles Hart:

"Q. It is your thought these directors were re-

(Testimony of Charles A. Burckhardt.)

miss in their duty in that they were too lenient with you in the matter of your $30,000 loan?

A. No, sir.

Q. It was all right to refrain from suing you, wasn't it? A. They had ample security.

Q. Had they collateral for this $30,000?

A. Yes, they certainly have. They have the collateral of the Alaska-Pacific Fisheries Company attached to that note—the stock of that company.

Q. Do you mean to say that stock has any value to-day? A. Yes, sir.

Q. Sufficient value to pay this $30,000 note?

A. Yes, sir.

Q. Do you say that the Bank and its directors should have sued you and forced your payment, or were they within the bounds of good judgment in not suing you, and in relying on that collateral?

Mr. BRISTOL.—If your Honor pleases, there is a limit to proper cross-examination.

COURT.—I think he has the right to find out. This man is charging the directors with negligence in not collecting these debts.

Mr. BRISTOL.—The complaint has no such theory as Mr. Hart is attempting to insert into it. In other words there is a difference here quite distinctly between what Mr. Hart is trying to get here, and what your Honor has been given to understand. Here is a trusteeship, and the faithfulness in regard to it, coupled with certain surrounding circumstances. Now, the private transactions of this man

(Testimony of Charles A. Burckhardt.)

are no more subject to question than you informed counsel when I was examining Mr. Menefee.

COURT.—Altogether a different question.

Mr. BRISTOL.—The situation about is is simply this: I have said that as between these people and ourselves we are willing to come to an accounting; if they will account to us, we will account to them. That is the gist of this case in that regard. If an accounting is required all these other private transactions certainly haven't any relevancy here.

COURT.—I understand you are charging these people with negligence, with accountable negligence in not managing this Bank.

Mr. BRISTOL.—As the intent of our bill, yes. But that is not the whole gist of the action by any means.

COURT.—This is one of the men making that charge. Now counsel has the right to know—

Mr. BRISTOL.—Just a moment, so you don't make any mistake.

COURT.—I may make a mistake, but I will be responsible for it if I do.

Mr. BRISTOL.—Very well; I call it to your Honor's attention. [521—184]

Q. Now, Mr. Burckhardt, you knew that these men in charge of this Bank were relying upon their intimate acquaintance with you, and on their belief in your business integrity and their belief that you would pay this note of yours, didn't you?

A. They knew that I had 250 shares of stock in

(Testimony of Charles A. Burckhardt.)

their Bank, which was more than enough security to pay that note.

Q. You don't mean to say that that was classed as security for your note, do you?

A. No; but they knew I owned that stock.

Q. You didn't pay the note, did you?

A. They never demanded it.

Q. All right. Now, then, something else. You mean to say that you refrained from paying this note, or any of these notes, at their maturity, just because these directors didn't demand it of you? Is that the reason you didn't pay?

A. If they demanded it I would have had to pay it.

Q. If they had forced you, you would pay?

A. Certainly.

Q. Then you think they were remiss that they didn't force you, is that it?

A. I will answer that question this way: If it defended upon the success of that bank to have that monet to keep that bank going, then they certainly were remiss in not asking me to force collection.

Q. And until they did—until that time came you felt free to decline to pay?

A. As well as loaning the money to other people. What is the difference as long as they had plenty of security.

Q. You were called upon specially to pay in November 1926, by Emery Olmstead, were you not?

A. Yes.

(Testimony of Charles A. Burckhardt.)

Q. And you didn't pay because you didn't want to sell other property at a sacrifice?

A. And they renewed the note. If Mr. Olmstead had insisted it be paid, I would have had to pay it.

Q. You knew that because of the knowledge and acquaintance these men had of your business operations, and their belief in your business integrity, they didn't need to worry about your money?

A. Yes. I am still solvent and can pay it.

Q. And you in turn were imposing upon them because you knew they would not be likely to force you as they would force a stranger?

A. I was borrowing money from other banks and renewing them in the same way. I didn't see anything exceptional about that. This is not the only bank I was borrowing money from.

A. Are your affairs in shape now, Mr. Burckhardt, so that if this lawsuit ends disadvantageously to you, you will promptly pay this note?

A. I can pay." (R., 530, 533.)

There was introduced in evidence, and to which the defendants' objected, the document of June 2, 1927, which purported to recite the meeting of the [522—185] board of directors of the Northwestern National Bank showing in its recitals a resolution, on motion of Collins seconded by F. F. Pittock, and at which meeting Spaulding, Price, Metschan, Collins, Pittock and Skinner were present, that "Whereas the bank held certain notes, acceptances, drafts and other obligations of Wheeler Timber Company, and others, of which the validity was

(Testimony of Charles A. Burckhardt.)

question," and other recitals relative to those transactions with respect to the same named parties consisting of several items, it was then recited, Item 5,

No credit was ever given by the Bank to J. E. Wheeler or anyone else on account of this draft, and the draft has not been included at any time in the assets of the Bank. The Bank agrees to surrender this draft any time to the Wheeler Timber Company for cancellation.

There was also offered in evidence Complainant's Exhibit 69, the report dated September 21, 1926, as made by Harris, and also the report made by Harris, March 5, 1927, Complainant's Exhibit 7, to which the defendants objected.

Thereupon complainants closed their case.

The following evidence was given by the defendants, O. L. Price, Charles H. Stewart, Mark Skinner, E. S. Collins, Phil Metschan and Charles K. Spaulding in the order named, and no other defendant testified. [523—186]

TESTIMONY OF O. L. PRICE, FOR DEFENDANTS.

PRICE testified that he came with the Bank as chairman of the board of directors in January, 1923, and had been vice-president since 1919; that the Bank found itself faced by loans that had become slow and frozen following the deflation in 1920 and 1921. The Bank had enjoyed a very rapid growth, in fact the peak of some of its deposits

(Testimony of O. L. Price.)

amounted to something like twenty-eight million, at which time they had something like nineteen million in loans, all in the main supported by collateral, and that collateral at the time it was taken had a sufficient margin, but during the deflation that margin was wiped out, and they found many cases where the loans were not adequately secured, and as quickly as possible the collateral was converted into property of the Bank; the Bank made some very substantial earnings, on *a* average of from $150,000 to $200,000 a year from 1920, but ceased paying dividends in 1920; that they made every effort that he thought it was possible to make to realize on slow paper; members of the board met regularly and discussed matters and devoted a great deal of time trying to work out problems; that he would drop into the Bank at different times where there were no special meetings; that there was a very small loss on loans prior to the deflation, and that the charge-offs were made on the profits that the Bank had on hand, that is, earnings when profits were made would be credited to profit and loss to offset charges and that same account as the result of getting rid of charging off part of the slow paper. This was done after the Bank Examiner had answered the question of what were [524—187] losses or determined bad losses. Critical letters were received from the Comptroller, but the witness said he did not recall that the Comptroller had called their attention to losses excepting as determined by the Examiner, which he said were charged

(Testimony of O. L. Price.)

off; that he did not recall that they ever refused to or *refrain* from calling off any losses that were said to be so by the Examiner. By the purchase by Wheeler of the Menefee stock they were enabled to get a sufficient amount of stock to make the sale of the Bank, for which tentative proposals had been made at that time to other people. Mr. Olmstead first told him about the purchase of this stock by Wheeler in 1923. When the loan of $150,000 was made to Wheeler in 1925 he never questioned Wheeler's credit, that he investigated the considerations before the Committee and he thought those were sufficient. The whole transaction seemed to be one that was wisely handled, and that the loans to Wheeler in 1925 was a prudent step for the Bank to take, and that subsequent developments have shown that step to be a proper one. The reason was that the collateral he got for both indirect and direct indebtedness, for all his indebtedness and for that known as the Wheeler Line, his individual guaranties were held; that applied to the Wheeler Estate, the Wheeler Timber Company and "The Telegram" and such as was owed by the McCormick Lumber Company by reason of returned checks; that he had never seen Exhibit 60 before until the trial of this case. The first suggestion of forming a subsidiary corporation to take over the assets of the Bank was in 1926 by Examiner [525—188] Wylde. The purpose was to organize a company and put in sufficient cash to take all frozen and criticised assets out of the bank and avoid criti-

(Testimony of O. L. Price.)

cisms that were coming from the Department, but the witness wouldn't say anything that might be subject to criticism; the purpose was to take out those which the Department had criticised as being carried as an asset. By the spring of 1926 the Bank demonstrated it had a good earning capacity. A committee was sent to visit the Comptroller and to go over the situation in Washington, D. C., getting his assistance and suggestions on the manner in which to carry out a plan tending to get the result which was desired, and that was taking out all criticised items which would in any way affect the payment of dividends. A letter was sent on the subject and a meeting arranged. Stewart Metschan and Price went to Washington about June 28th, 1926, at which time Comptroller McIntosh and several deputies were present, and all matters thoroughly gone over, and the Comptroller determined to hold his final consent or objection until after the next examination, at which time it was suggested that Chief Examiner Harris be present, and this was the examination in the fall of 1926 in September; that was the time for the regular examination. It was determined that there was a million and a half which should be taken out as frozen and slow paper, $750,000 to be cash and $750,000 to be bonded through a subsidiary. A change in management was discussed with the Comptroller at that time, and it was deemed advisable by the Comptroller *and* that if any change was made it should not be made until after this [526—189] liqui-

(Testimony of O. L. Price.)

dating company had been organized and completed. A suggestion was made to the Comptroller that inasmuch as Olmstead had sold most of the stock of the Bank that it would be easier for him to see the stockholders than anybody else, and that was agreed to by all and the results were reported to the board when they returned. Then they waited until after the examination in September. The board determined to go ahead with the plan if approved by the Comptroller and after this examination the Comptroller was met in San Francisco with the Chief Examiner, Mr. Harris, by appointment in the latter part of December, 1926, in company with Charles H. Stewart, they had their lists and all matters relating to the Bank and everything for examination was gone over, and the plan was approved by the Comptroller, and they advised that when this plan was completed that we could begin paying dividends of 5 or 6 per cent beginning with the first quarter of 1927; then an effort was immediately made to interview the stockholders and get their consent to putting up $37.50 a share, and the officers and directors were active in order to get the plan going up to the 8th or 9th of February, 1927; the greatest difficulty appeared to be getting the payment by Mr. Wheeler. He had a large block of stock. His payment would be a large amount. He was expecting to get his money every day and it was not determined until after the 11th of February, 1927, that he could not raise his part. That assurances were given the bank by Olmstead who

(Testimony of O. L. Price.)

had reported at each meeting and always assured of the progress that Wheeler was making and that he expected to make a sale any time and reduce [527—190] his indebtedness if not pay entirely, but the plan was not carried out and was given up on discovery of a large amount of frozen checks of Wheeler's running into some $800,000, of McCormick Lumber Company obligations, that Wheeler was not going to be able to make the payment of this float or kite let alone the payment of $180,000 on his stock in the subsidiary company, and it appeared that the redwood sale was not going to be consummated, at least within a reasonable time, and that in the judgment of the witness if the plan had been carried through it would have accomplished what he and his board thought it would, and that was the judgment of Chief Examiner Harris and the Comptroller expressed by them in these meetings to the witness.

That the executive committee functioned regularly every year from 1922 to 1926 and the Examining Committee functioned every year during that period since the organization of the Bank with very fair and efficient examinations, and the examinations took five or six days at a time, three members of the board acting upon the Examining Committee, and they called for information from different departments and examined it and they did make the inspections that the reports called for, and they did come to the Bank and they did their work at the Bank, and this was true of all examinations

(Testimony of O. L. Price.)

of the Examining Committee, and that they did so efficiently, and as to investigations as to credits and things referred to in the reports the witness thought that was always efficiently done. The Examining Committee did not include officers of the Bank. [528—191] In March and April, 1926, the attention of the board of directors was called to the fact that there were in the cash items of the Bank at the time of the First National Bank Examiner's examination certain checks and acceptances of Wheeler or the McCormick Lumber Company amounting to some $47,000, representing returned checks but which he said at the same meeting had been removed during the course of his examination. These checks had been deposited to the account of J. E. Wheeler. The McCormick Lumber Company had no account there at that time, and it was at the close of that examination that the witness' attention was called to the presence of these checks but that he had said the Examiner told him that during the course of that examination these checks had been taken care of, and that that meant they had either been paid or in some manner removed from the Bank's assets, and at that time there was a criticism of acceptances being carried in the assets of the Bank. These were drafts drawn on Wheeler and Wheeler acceptances which were being renewed and carried in bills in transit, and the Examiner suggested that these be removed from bills in transit and placed in notes and discounts. Thereupon this witness testified by question and answer as follows:

(Testimony of O. L. Price.)

"Q. I direct your attention to testimony given by Mr. Olmstead in this case, in which he said that he had a conversation with you in July of 1926, at which the subject of Wheeler's acceptances were discussed. What is your statement as to that? Did you have such conversation in July about acceptances?

A. Not at that time. These acceptances had been taken out of Bills in Transit and put in Notes and Discounts in April.

Q. And when did you have a conversation?

A. No, I didn't at that time. I have no doubt I had with reference to these acceptances at that time, because we were all discussing them. [529—192]

Q. That is in April?

A. In April, yes, when they were transferred from Bills in Transit to Notes and Discounts.

Q. You say you have no doubt that you had a conversation with him in April about it?

A. I have no doubt I had.

Q. What if any conversation did you have with Mr. Olmstead in July about Wheeler, or the Wheeler obligations?

A. Oh, I couldn't answer that; I spoke about Wheeler and his obligations and his lines I suppose every day or so; that was a matter of constant discussion between us, as to Wheeler's lines, and whether he was making sales, and how soon he would be able to take his share of the proposed

(Testimony of O. L. Price.)

liquidating company; we often had discussions on that subject.

Q. State whether or not during any of these conversations during the summer or fall of 1926, and up to the first part of February, 1927, Mr. Olmstead ever disclosed to you that the McCormick Lumber Company checks were being received for credit and were being returned unpaid?

A. We never had any conversation about it.

Q. State whether or not he at any time directed your attention to the McCormick Lumber Company account, or to the dishonored checks deposited and credited in that account?

A. He did not." (R., 1022, 1023.)

That no one during the summer or fall of 1926 had ever directed the witness' attention or ever mentioned to him that checks deposited in the McCormick Lumber Company account were coming back unpaid, and that he had no information during the summer and fall of 1926, until February 8th or 9th, 1927, whatsoever that any practice was going on which sanctioned the receipt and approval of checks for deposit in the McCormick Lumber Company account, which checks later came back unpaid, and upon being asked whether he had any knowledge at all as distinguished from information the witness*ed* answered he did not, and that during this whole period nothing occurred at any time to give him the slightest suspicion that any officer of the Bank was approving checks regularly for immediate credit and the checks themselves coming back

(Testimony of O. L. Price.)

dishonored, and that during all this time he had the fullest confidence in every officer of [530—193] the Bank and that during this period he examined the daily statement of the condition of the Bank as was his custom to look at it every morning and he did so most of the time "HAVING IN MIND OF COURSE CERTAIN PURPOSES IN LOOKING AT IT."

The witness was not at the Bank all day until the first of March, 1927, but was at the Bank every morning. The loaning officers met every morning and he was always at the meeting when in the city and that meeting had before it the daily statement and a continuation of the deposits whether or not they had increased or decreased and everything with reference to the commercial deposits and savings accounts, and it was the general practice daily for him to look at matters which would attract his attention and every time he looked at the daily statement there were usually figures that were set in, not part of the debits and credits, but all during all of these times he was never suspicious or on the watch for anything irregular; that never entered his head.

The witness then, in response to a question, detailed in his own language what he said was discovered and the circumstances of that discovery:

"A. I think it was on Tuesday evening after one of our executive meetings, I came from the room and Mr. Skinner and Mr. Stewart were at the desk of one or the other, and they called me over, and

(Testimony of O. L. Price.)

one, I think it was Mr. Stewart, said that he thought there was something phony about the Wheeler matter, and I asked him what it was, and he said, 'Well, I think it involves the boss.' I asked again, and I was—didn't get any information. I says, 'I will find out.' The next morning, which was our regular officers' meeting, at which were present among others, Mr. Olmstead, Mr. Stewart and myself. In fact this conference which I now repeat was only between Mr. Olmstead and myself; the other officers had gone out, and I was sitting at the end of the desk, [531—194] and Mr. Olmstead's secretary brought in a deposit book with some items for deposit. As he took the deposit from the deposit book I recognized immediately Mr. Wheeler's signature. I asked Mr. Olmstead, 'What is that?' He *says were* deposits by Mr. Wheeler. I says, 'What does it represent?' He says, 'It is checks drawn on eastern banks which I O. K., and I only O. K. them when I have a wire stating that the funds are there to meet it.' With that he drew from his desk a roll of telegrams, without showing me the telegrams, intimating that those were the telegrams he referred to. I said, 'Has Wheeler any float in this Bank?' He said, 'Yes.' I said, 'How much?' He said it amounted to several hundred thousand dollars. Immediately with that he got up, and walked back and forth across the floor, and recited how that he had been trying for months to get Mr. Wheeler to make some sales; that Mr. Wheeler each day had promised him that sales were

(Testimony of O. L. Price.)

about to be consummated. He had been after him constantly, and he knew, and I knew he had to make those sales, but he had been unsuccessful. He talked for some little time. I said nothing. After he got through I walked out to Mr. Skinner's desk. Mr. Skinner was also secretary of the Board; and I told Mr. Skinner, 'Mr. Wheeler has a large amount of float in this Bank, you call a meeting of the Board of Directors immediately.' He said, 'How soon?' I said, 'Just as soon as you can get them.' This was Wednesday morning. I knew that Mr. Spaulding usually was in Salem on that day, and it might take a little time. So I went immediately from there to Mr. Morden's office. Mr. Morden is my co-trustee in the Pittock Estate, and I told Mr. Morden what I had learned. I went from his office into Mr. Pittock's office — Mr. Pittock was one of the directors—and told him. I didn't go back to the bank until about four o'clock in the afternoon, at which time Mr. Olmstead met me and said he wanted to talk with me. I failed to say that I had asked Mr. Skinner to notify Mr. Olmstead that I had called a board meeting. Mr. Olmstead said, 'Mr. Skinner tells me that you have asked for a Board meeting.' I says, 'Yes.' 'Well,' he says 'When are you going to have it?' I says, 'Just as soon as we can get it.' He says, 'I wish you would wait until Wheeler can get back; Wheeler is in San Francisco, and I want him at that meeting.' I says, 'How soon can he get here?' He says, 'I was speaking to him today, and I told

(Testimony of O. L. Price.)

him he would have to come, and he will be here Friday morning on the early train.' I says, 'That is all right.' I told Mr. Skinner then to make that call of the board for nine o'clock Friday morning. Friday morning when—

Q. Before you get to that, state whether or not any instructions were given to discontinue accepting for immediate credit any more checks deposited in the McCormick Lumber Company account?

A. No instructions were given until the meeting on the 11th or Friday.

Q. Go ahead.

A. Mr. Wheeler came to the Bank. In the meantime I had asked Mr. Olmstead to get for me as nearly as he could the exact amount of this float. He said he would have to get it from the bookkeeper, Mr. Wheeler's bookkeeper. [532—195] On Friday morning when Mr. Wheeler came in I asked him if he had a list of these amounts, and he said approximately, and he and Mr. Olmstead were working on this matter until about eleven o'clock, before the board actually met. Before the meeting of the board Mr. Wheeler said that the amount was $554,000. When the board met I informed them of the purpose of the meeting, and I asked Mr. Wheeler what he intended to do about these checks as they were returned. He started in talking about the sales he was just about to make, the redwood sale, and we called him away from San Francisco; he thought he had a sale for this Trask timber, and undoubtedly he

(Testimony of O. L. Price.)

would very soon make a sale of the 'Telegram.' I told Mr. Wheeler that he didn't have time to make sales, he would have to arrange to get that money quickly some other way; and I suggested to him that this was a time he would have to call on his family. He said that he couldn't talk to Biff, his brother, and the only one he could talk to was William, who was then in San Francisco. I asked him to talk with William, and he said he didn't like to take William away from San Francisco because he was working on this redwood deal, which sale certainly would be consummated in a few days. After a considerable discussion—Mr. Olmstead had asked me what was to be done—I said we would pay no more; we would give him credit for no more such checks. Mr. Olmstead wanted to know what we would do about the checks that were coming back, and I told him if he can't take them up they will have to go in the usual course. He says, 'Do you realize what that means? When this amount of checks comes back to this bank?' I says, 'Yes, I fully realize it, and we will take our medicine now.' The meeting adjourned after a considerable discussion. The next day was a holiday, February 12th, Saturday. On Monday morning when we expected William Wheeler up here—we had asked for him to come—Mr. Wheeler came in, and we asked where William was. He said he wasn't coming yet. We asked if he had talked with him; he said, 'Yes, I talked with him over the phone Friday, but he couldn't come.' I asked him if he had told him

(Testimony of O. L. Price.)

of the difficulty he was in. He said, 'No, he couldn't talk over the phone. And then from that time on we were working with Mr. Wheeler, Mr. Olmstead and myself, trying in every way possible to see if we couldn't raise a sufficient amount of money to meet this float.

Q. During the week following February 12th you think you were in constant touch with Mr. Wheeler in an effort to get him to do something?

A. Constantly.

Q. And during that same period I assume these checks which were in the course of—were in transit—were gradually coming back.

A. They were coming back. I asked the auditor to advise me on it as rapidly as they came back, so I would know the amount.

Q. And when they were all in they amounted to what? A. Almost $800,000.

Q. After your discussion with Wheeler, which you say you got nowhere, what next was done?'' (R., 1026, 1030.) [533—196]

Thereupon the witness stated that the details of abandoning the plan previously described as growing out of the meeting with the Comptroller and that as a chance circumstance he met with Mr. Wright and Mr. Dick of the United States National Bank, who had informed *that* that they had understood on the street that the Pittock heirs were buying up some stock, and if there was any thought of selling the Bank they would be interested, and this led into a discussion and the witness

(Testimony of O. L. Price.)

tried to get an offer, and at this time Olmstead undertook negotiations with the First National Bank; both sets of negotiations were being carried on at the same time; the witness having nothing to do with the First National until after the United States National deal was called off when he participated with Olmstead, and this was the time that Elliott Corbett on the 23d of February came to his house and Olmstead and he discussed with the First National Bank the matters referred to in the letter from the Comptroller following the examination in September, which set out in a general way the criticised items, and that was followed by sending some of the officers to the Bank with some of their loans or, at least, their principal loans, and they so nearly got together that it became necessary for the First National to go a little more into detail as to their assets and then it came about that it seemed to be wise to tell them about the float, stating that that would be one of the matters which they would deem rejected assets and they would take it out of the amount that they would give them. As the witness expressed it, we had a capital and surplus of [534—197] two million four hundred thousand dollars plus, and undivided profits and we would add to that any appreciation that would be in our building which we were satisfied would be some few hundred thousand dollars, and we would add to that the amount which the First National Bank would allow us for the first premium on deposits which

(Testimony of O. L. Price.)

would bring it up and they would pay us the balance in cash. That was the program.

The Elliott Corbett was asked to meet the witness at his brother's office in the Corbett Building, and the witness told him just what they would find when they got into the assets and that he had not told him before because it should not interfere with the sale because we were going to take that as part of the rejected assets. At this time the witness said he was negotiating a loan of the First National Bank because Olmstead had retired from the negotiation. Finally we adjourned the matter until the last Sunday in February, 1927, and they told me what they would do and it was a proposition that was impossible for us to carry out,—"not impossible to carry out but it made negotiations impossible." They required that we should put up immediately $2,250,000 in cash against which they could charge anything that they liked, only allowing us a percentage on such deposits that would remain on the list of March 1928, after the lapse of a year's time. During this period the board was almost in daily session and it was concluded that if we were required to put up this money to the Bank that it would be [535—198] better for us to put up two million ourselves and continue in business, and we thought if we did that that we would be in excellent condition, and this resolved itself in two propositions, one was to organize a new Bank with two million dollars capital and purchase the Northwestern, and the other was to put the money in in the form of an assessment

(Testimony of O. L. Price.)

and continue under the old charter. If we organized another bank the money would have to be paid in by those who would subscribe and if it would have to be raised by assessment it would have to be raised either voluntarily or involuntarily on the part of the stockholders, and we had a meeting that night and it was agreed that payment of two million dollars to be subscribed to whatever plan would be finally determined as a wise one and that when they did finally determine it it was not to go ahead with the state bank. Mr. Olmstead did not make any subscription, he was present, but the two million was fully subscribed that night, and when we left the situation that received the most favorable conclusion seemed to be the state bank, although there was some objection to it. No conclusion had been really reached and we adjourned to meet the next morning, and I reached the determination that they were not advisable,—the witness described the situation in his own words as follows:

"In the first place Mr. Pittock had started this bank and in his will provided that the trustees might invest his surplus moneys in good securities. He made a provision however, that the trustees could advance such money as might be necessary, either with or without security, to protect that estate. It was a serious matter in my mind whether [536—199] or not that would permit us to step out and subscribe in a different—in a new bank; I know that it could only have been considered in consideration of preserving the estate.

(Testimony of O. L. Price.)

Q. Just an emergency.

A. As an emergency; would not be proper for us otherwise under instructions, and there might be some difficulty in that, although I felt certain that Mr. Pittock would expect us to put up every dollar that might be necessary to protect that which he had—the investments which he had made. We knew that sooner or later the information in reference to this large amount of money would become—

Q. You mean the $800,000 float?

A. The $800,000.

Q. Kite or whatever it was.

A. Would become known outside. It was very necessary that something be done, and something be done quickly. The plan that we wanted was the one that would attract the least attention on the outside. For us to organize a new state bank would seem to advertise to all the world that there was a reason and we would have to give that reason; every depositor would have to have his bank changed; he would have to know that it was a different bank; the matter of going from a national bank to a state bank I think is, I feared might be considered as showing weakness. We were then members of the clearing-house and also of the Federal Reserve Bank. I figured that if something did happen, if we were in the clearing-house or in the Federal Reserve Bank we would have to make new application which might take some time to become members of the clearing-house and also of the Federal Reserve. We were at that time indebted to the

(Testimony of O. L. Price.)

Federal Reserve Bank something like a million and a half which would have to be paid immediately if we liquidated the Bank. From the standpoint of what was fair to the stockholders, it seemed to me it was an unwise thing to do. If the new stockholders in the new Bank should pay more than it was worth, it would certainly be unfair to the new subscribers. If it paid less than it was worth it would certainly be unfair to those stockholders who remained in the Northwestern but didn't become members of the new Bank. It seemed to me that we might go ahead and continue under the arrangement of assessment, and then I believed that we could go before our stockholders' committee and tell them the truth, and I had confidence enough to believe that most every one of them would pay their hundred per cent assessment voluntarily, especially if we provided—especially after we had raised the two million dollars; that is what the Bank immediately could pay; and those who couldn't pay we would have enough money raised so that the government and depositors would be satisfied, and from this sum that we could raise, out of the two million dollars—we could pay from that sum such amount, if it became a voluntary assessment as the stockholders would refuse to pay. We went further than that and suggested at that time that we would take this amount of money—we would go to the stockholder and ask him to put up 100% assessment. If he says I can't do it, then we will say, out of this pool which we have raised we will loan [537—

(Testimony of O. L. Price.)

200] the money to make up your own payment; if you will turn the stock over to us we in turn will give you an option to repurchase that at that time within one year, plus six per cent interest. It seemed to me that was a fair thing to do, and a wise thing to do in the circumstances.

Q. You proposed to virtually buy or take over the stock of any stockholder who couldn't or wouldn't pay; but the stock at a nominal figure, and pay the assessment upon it. A. Yes, sir.

Q. And give your stockholders the right to buy it back in one year for the amount of the assessment which you had paid on it? A. That is true.

Q. Now, were all of these reasons detailed by you at your meeting of the board of directors on the Monday morning following?

A. When we met the next morning—I may be wrong a day or two there; I don't know whether the first of March came in on Tuesday or Wednesday; and the next morning in our board of directors meeting these matters were detailed to the board, and I think they thought that the matter of going on with the old institution and putting in this money in this manner, was the advisable thing to do.

Q. And was this decision reached at that meeting?

A. And that decision was reached at that meeting. We then raised approximately one million in cash, and were willing—entered into a writing showing that we were willing to stand back of the Bank and raise if necessary the other million. And

(Testimony of O. L. Price.)

we then called in the Bank Examiner, the local man, Mr. Crowley, who advised us the manner in which to do it.

Q. Did you then arrange for another examination made by the Federal Bank Examiner, so as to form the basis for an involuntary assessment should it become necessary?

A. Just before that night, on the first day of March, when this matter was determined and this money was raised, and we called the board together, Mr. Olmstead presented his resignation and I was elected president of the institution; and immediately thereafter when we called the Examiner in, the local man, and asked him how to prepare—how to handle the matter—of course it became necessary to have another examination showing that the capital was practically wiped out, so as to make an involuntary assessment if necessary. We then requested an examination, and that is the one followed when Mr. Harris came up and made another examination.

Q. That was for the purpose of having a legal basis upon which an involuntary assessment of 100% could be levied against the stock if you found it impossible to get a voluntary assessment?

A. Yes, sir.

Q. And was it at this time that there was made public through the newspapers, the statement substantially as that—as it appears in the bill of complainants in this case?

A. Yes. That article appeared in the Oregon-

(Testimony of O. L. Price.)

ian, and was submitted to me before it was printed, and I approved of it. [538—201]

Q. That spoke of the fact that the Pittock Estate had acquired a larger share of ownership in the Bank. Was that what it referred to, this increase of stock holdings?

A. I don't think that was hardly the statement that was made. It didn't speak of them having acquired a greater share, but a larger interest, I think. That interest was $769,600, which they put up. (R., 1039, 1043.)

Then the examination of March 5, 1927, hereinbefore referred to was brought about and they proceeded along a plan to about the 24th of March for a voluntary and involuntary assessment of stock. The Bank's assets had value and the 100% assessment was designed to protect it. There were some withdrawals, Mr. Olmstead going out they knew would cause comment and they started into get themselves in the best possible condition by calling in notes as rapidly as possible and getting clear as quickly as possible the Federal Reserve Bank so that they could go back to it and get their full amount if required. Then came rumors of defalcation. There was a slight decrease in deposits, corresponding increase in savings, and the witness went to San Francisco in the latter part of March to see Mr. Fleishhacker because both Wheeler and Olmstead owed the Anglo Bank money on their stock and the 4,700 shares affected the matter; and he also went to see Ballin, one of the complainants

(Testimony of O. L. Price.)

herein, and he saw Dollar and the Standard Oil People and made efforts to get money, and finally Skinner telephoned him that conditions were bad and he was fearful about consequences and the witnesses accordingly returned to Portland Saturday night arriving Monday morning.

He finally saw Ainsworth as the result [539—202] of Mr. Dick or Mr. Wright asking him to come down to the United States National and he then added that he had no knowledge of any acts during the past years of the First National or the United States National which might be unfair to the Northwestern; that he had no such knowledge; they were competitors but they wanted to be fair as far as he knew. He stated this in view of the testimony of his talk with Ainsworth; and it was suggested to go to the clearing-house and a meeting was held that afternoon. The run was then on at the Bank but the clearing-house meeting came to no determination although it was expected to be able to send some representative from the clearing-house to tell the crowd not to worry and the clearing-house couldn't see their way to get back to the Northwestern; but a decision was reached as to the guarantee they were willing to put up to the clearing-house but the clearing-house couldn't act upon that; they postposed the meeting to an evening meeting and the witness then went back to determine what to do. It was necessary to borrow a large amount from the Federal Reserve and they borrowed two and a half million during that day.

(Testimony of O. L. Price.)

We wanted to see what we might do about raising two million which we all agreed might be easily raised. The deposits were about eighteen million beginning of business Monday and about three million was paid that day. Mr. Morden, his co-trustee, went with him to the meeting that evening along with Mr. Crowley, the Bank Examiner, Mr. Stewart and Mr. Skinner and after considerable discussion it was decided that United States National [540—203] and the First National would be willing to assume and pay our deposits providing they could be secured by a sufficient amount of assets and guaranties. At this meeting it was tentatively determined that the First National and the United States National assume the responsibility and the report was made to the board of directors and it was the unanimous opinion of the board that the depositors must be paid without delay whatever securities might be necessary on their part conditioned upon the examination during the night by the two banks, whereupon came the examination that Mr. Ainsworth described, and in the early morning of the following day these banks stated how they would carry out their program, and their requirements were conceded with in every respect. We had put up a million dollars in cash at that time and they required us to put up a million which we said we would guarantee in cash between that and ten o'clock in the morning, and we entered into a separate guaranty of two million dollars to be signed by the Pittock Estate and the directors in-

(Testimony of O. L. Price.)

dividually and leaving still to them our stockholders' liability. These conditions were all acceded to. We raised this other million *and* between that and ten o'clock in the morning, and signed the guaranties. The arrangement also required us to liquidate the Bank.

The witness then testified that the Bank was closed out and the liquidation had been handled by the officers of the Northwestern in a very excellent way and the witness further testified the opinion that the Bank was with that additional capital in excellent condition. [541—204]

The defendants insist, over the objection of the complainants, that in lieu of the statement of the witness O. L. Price on direct examination, on the foregoing pages 187 to 205, that there be substituted the statement prepared by the defendants so that the Appellate Court may have the benefit of each statement and the objection of the complainants to the substituted statement of the defendants in that regard with respect to the direct testimony of O. L. Price as hereby noted, and the substituted condensation of the testimony of the witness Price as suggested by the defendants to be inserted herein is as follows:

TESTIMONY OF O. L. PRICE, ONE OF THE DEFENDANTS.

Witness became chairman of the board of directors of Northwestern National Bank in January, 1923, having been vice-president for several years prior thereto.

The deflation which came in 1920, following the inflation which came immediately after the war, left the Northwestern National Bank with loans that had become slow and frozen. Nearly all of these loans were made prior to 1920, during a time when the Bank was enjoying a very rapid growth. At the peak of this growth the Bank had deposits amounting to about twenty-eight million dollars with about nineteen million in loans. These loans in the main were supported by collateral which when taken had a margin of value which was sufficient. During the deflation this margin was wiped out so that in many cases the loans were no longer adequately secured. As rapidly as possible [542—204–a] this collateral was foreclosed upon and converted into property of the Bank.

During the years 1921 and up to 1926 the Bank made very substantial earnings, running from $150,000 to $200,000 a year from 1920 on; and this was despite the fact that the Bank discontinued paying dividends in 1920.

Every effort was made to realize on this slow paper held by the Bank. The board met regularly and considered all loans that were giving trouble.

(Testimony of O. L. Price.)

The officers who had the several loans under their respective supervision were called upon for reports, and the board advised with these officers continuously in the attempt to liquidate the slow loans. The board of directors, and particularly those who were on the executive committee, paid extremely close attention to these matters. They met regularly every Tuesday, going over old loans as well as new loans and renewals, and they devoted a great deal of time in the effort to work out the problems not only at meetings but by dropping into the Bank every day to see what could be done.

There was a very small amount of loss incurred by the Bank on loans made subsequent to the deflation period.

Action was taken regularly to charge off slow and frozen paper whenever, following examinations by the National Bank Examiner, a decision would be made by the Examiner that any particular loan should no longer be carried as a live asset. The earnings which were made in these years were credited to the profit and loss account and corresponding debits would be made for all slow paper charged off so that the earnings were thus absorbed into the assets of the Bank to replace the slow paper taken out. In every case these charge-offs were made after the Examiner had determined subsequent to his examination what loans should be charged off.

(Testimony of O. L. Price.)

Occasionally letters were received from the Comptroller of the Currency which were critical in tone, but there were no criticisms of loss not charged off and the witness does not recall that the Bank ever refused or refrained from charging off any paper that was determined to be a loss by the Examiner.

Witness did not learn about the purchase of some 4,000 shares of the stock of the Bank in 1923 by J. E. Wheeler from Messrs. Menefee, Jones and Standifer, until after the purchase had been consummated. Witness had nothing to do with the matter and knew nothing about it until the deal was [543] closed. About that time there had been some negotiation for the sale of the Bank and the purchase of stock made by Wheeler put an end to the attempt to sell the Bank in that those attempting the sale no longer had a majority of the stock of the Bank. Witness first learned of this stock purchase from Mr. Olmstead, the president.

Witness was not present at the meeting of the executive committee of the Bank at which an additional loan to J. E. Wheeler of $150,000 was authorized, but upon his return to the city witness investigated and reached the conclusion that it was good judgment to make the loan, particularly because collateral was secured to cover not only the new loan but prior loans. This proved to be true when Mr. Wheeler subsequently became involved, since the Bank was placed in the position of a holder of substantial collateral for all the Wheeler

(Testimony of O. L. Price.)

indebtedness, including the indebtedness of the Telegram Publishing Company, the Wheeler Estate, the Wheeler Timber Company and the McCormick Lumber Company.

Witness had never seen prior to the trial the Exhibit 60, an agreement between stockholders made in 1925, pledging the signers not to dispose of the stock except following an agreement of the majority.

The first suggestion that the Bank form a subsidiary corporation to take over certain unproductive and slow assets came by way of a recommendation on the part of Bank Examiner Wylde after his examination in March, 1926, and the same recommendation was made by the Examining Committee of the Bank shortly thereafter. The plan was fully discussed by the board in March and April, 1926, and the conclusion reached that a company should be organized with sufficient cash capital to permit it to acquire from the Bank all assets which had been criticised, so that the Bank could at once resume the payment of dividends and avoid further criticism from the Comptroller of the Currency. The plan had been fully developed and approved by the board prior to the receipt of the Comptroller's letter in April, 1926. It contemplated taking out all slow assets of every kind so that the earnings of the Bank which had been reasonably constant and adequate for the purpose could be devoted to the payment of regular dividends.

In the effort to put this plan into effect the board

(Testimony of O. L. Price.)

decided to send a committee to Washington to go over the whole situation with the Comptroller of the Currency. Such a committee, consisting of Mr. Metschan, Mr. Stewart and the witness, went to Washington for this purpose. Mr. Olmstead had been appointed as one member but being [544] unable to make the trip, Mr. Stewart went in his place. The conference was held about June 8, 1926, with the Comptroller, Mr. McIntosh, and several of his deputies. The last preceding report made by Bank Examiner Wylde was thoroughly examined and discussed. After the conference the Comptroller stated that the plan for the formation of a subsidiary seemed to be a wise program and stated that he would give his final consent or state any objection he might have, after the next regular examination which was scheduled to take place in the fall of 1926. It was also suggested that Chief Examiner Harris should participate in the forthcoming examination so that there would be no question of the sufficiency of the examination. The plan as put before the Comptroller was to have a subsidiary with $750,000 capital secured by having each stockholder of the Bank subscribe $37.50 to the stock of the subsidiary for each share of Bank stock held. With this capital the subsidiary would purchase a million and a half of frozen and slow paper, giving its notes or bonds for the balance of the purchase price, secured by a lien on all of the assets taken over. This would give the Bank $750,000 in cash and $750,000 in bonds of the sub-

(Testimony of O. L. Price.)

sidiary secured by the entire million and a half of assets taken over.

At the conference with the Comptroller there was also considered the suggestion theretofore made by the Comptroller in his letter written in April, 1926, that a change of management would be advisable. The conclusion reached by the Comptroller and the committee was that the change, which meant the resignation of the president, Mr. Olmstead, should not be made until after the liquidating company had been organized and the transfer of assets consummated.

The proposed plan for a subsidiary necessarily would require some little time since the stockholders would have to be given the facts orally rather than through correspondence. For this reason also the Comptroller agreed that Mr. Olmstead should remain during the consummation of the plan since he was best equipped to explain the necessity for the liquidating company to the stockholders.

The board and the management of the Bank started in immediately upon this program, some stockholders having been interviewed even before the plan was fully decided upon, although it was not possible to make final plans until after the fall examination by Chief Examiner Harris and the expected approval of the Comptroller was secured. This examination was had as planned and immediately thereafter witness and Vice-President Stewart met the Comptroller and Chief Examiner Harris in San Francisco. At [545] this meet-

ing the whole situation was reviewed and the plan for a liquidating company was approved by the Comptroller, and witness was advised that when the plan had been completed the Bank could resume payment of dividends beginning with the first quarter of 1927. This meeting in San Francisco took place just before Christmas, 1926.

Between the time of the San Francisco meeting and the 8th or 9th of February, 1927, the officers and directors of the Bank were very active in the attempt to get the stockholders to make their subscriptions to the stock of the liquidating company. The chief difficulty encountered was in getting the payment required from J. E. Wheeler who held a large block of the stock of the Bank. He was expecting daily to make a sale of timber which would enable him to take his share of the stock of the liquidating company. The board received reports at each meeting from Mr. Olmstead giving the progress that Mr. Wheeler was making and believed up to the time the so-called "float" was discovered in early February that the plan could be carried through; and the plan was not given up until the discovery of the "float" made it clear that Mr. Wheeler was not going to be able to take his share of the stock of the liquidating company, and also that the frozen assets necessary to be taken out had been increased by nearly $800,000, the amount of the so-called "float." Witness has no doubt that if this "float" or "kite" had not occurred the plan for a liquidating company would have been consum-

(Testimony of O. L. Price.)

mated; and this was the judgment also of Chief Examiner Harris and the Comptroller of the Currency.

In all of the years since the organization of the Bank the Examining Committee of the Board of directors functioned regularly each year as contemplated by the by-laws. The examination usually took five or six days or longer and the witness believes the examinations were very fair and efficient. The Committee consisted of three members of the board of directors; they came to the Bank and worked there collecting full information from the different departments and themselves inspecting and examining the material brought to them. The members of the Committee were, of course, not technical bankers but their work as described in their reports was efficiently done. The Committee always consisted of directors who were not officers of the Bank giving their entire time to the Bank's affairs.

In March or April, 1926, Bank Examiner Wylde in the usual meeting with the board of directors following an examination, informed them that there were included in Cash Items $47,000 of [546] checks which had been deposited to the credit of the account of J. E. Wheeler but which had not been paid by the drawee banks and therefore had come back and were being carried in the Cash Items. At this time the McCormick Lumber Company was not a depositor nor was it a borrower from the Bank. The information given by the Bank Ex-

(Testimony of O. L. Price.)

aminer was that whereas these unpaid checks were found in the Cash Items at the beginning of the examination, they were removed during the examination. The Examiner also called the board's attention to the fact that there were some Wheeler acceptances or drafts drawn on Wheeler which had been accepted by responsible parties but which had been renewed instead of being paid when they matured. The Examiner criticised carrying these renewed acceptance of Bills in Transit and stated that they should be replaced with notes so that the notes could be in Notes and Discounts. They were thereupon transferred to Notes and Discounts.

The conversation which the witness Olmstead stated he had had with the witness in July, 1926, regarding Wheeler acceptances related to these acceptances referred to by the Examiner and the conversation must have taken place in April.

There were other conversations with Mr. Olmstead frequently about the Wheeler obligations. The question of Wheeler's share in the proposed liquidating company was a subject of constant discussion between Mr. Olmstead and the witness, but the witness never had any conversation with Mr. Olmstead during the summer or fall of 1926 and up to the first part of 1927, regarding unpaid McCormick Lumber Company checks which had been accepted for credit and later returned unpaid by the drawee banks. The attention of the witness was not directed to the McCormick Lumber Company account nor to the return of checks at any

(Testimony of O. L. Price.)

time during this period by any officer or employee of the Bank, and the witness had no knowledge up to the 8th or 9th of February, 1927, that any practice was going on under which McCormick Lumber Company checks were accepted for immediate credit and later received back unpaid. Nothing occurred during this period to give the witness the slightest suspicion that any transaction of this kind was going on; and the witness had the fullest confidence in every officer of the Bank. Witness was at the Bank every morning, spending most of the forenoon at the Bank, and it was his custom to look at the daily statement every morning, having in mind, of course, certain purposes in examining the statement.

Witness did not devote his full time to the Bank's affairs during this period or at any time until the first of March, 1927, but it was his [547] custom to go to the Bank every morning, always participating in the daily meeting of the loaning officers when in the city. This meeting had before it each morning a statement showing whether deposits had increased or decreased and data with reference to the commercial deposits and savings account. In looking at the daily statement witness made it a practice to look at the figures showing net profits, gross deposits, bills payable particularly those owing to the Federal Reserve Bank, and then the segregated deposits—savings, commercial, etc. The testimony of the witness regarding the discovery of an irregularity in the acceptance of Mc-

(Testimony of O. L. Price.)

Cormick Lumber Company checks for immediate credit is as follows:

"Q. Coming now to the early part of February, 1927, you have already stated that an irregularity was discovered. Will you please give the circumstances of that discovery?

A. I think it was on Tuesday evening after one of our executive meetings. I came from the room and Mr. Skinner and Mr. Stewart were at the desk of one or the other, and they called me over, and one, I think it was Mr. Stewart, said that he thought there was something phoney about the Wheeler matter, and I asked him what it was, and he said, 'Well, I think it involves the boss.' I asked again, and I was—didn't get any information. I says I will find out. The next morning, which was our regular officers' meeting, at which were present among others, Mr. Olmstead, Mr. Stewart and myself—in fact, this conference which I now repeat was only between Mr. Olmstead and myself; the other officers had gone out, and I was sitting at the end of the desk, and Mr. Olmstead's secretary brought in a deposit book with some items for deposit. As he took the deposit from the deposit book I recognized immediately Mr. Wheeler's signature. I asked Mr. Olmstead, 'What is that?' He says were deposits by Mr. Wheeler. I says, 'What does it represent? He says, 'It is checks drawn on eastern banks which I O. K., and I only O. K. them when I have a wire stating that the funds are there to meet it.' With that he drew from his

(Testimony of O. L. Price.)

desk a roll of telegrams, without showing me the telegrams, intimating that those were the telegrams he referred to. I said, 'Has Wheeler any float in this Bank?' He said, 'Yes.' I said, 'How much.' [548] He said it amounted to several hundred thousand dollars. Immediately with that he got up, and walked back and forth across the floor, and recited how that he had been trying for months to get Mr. Wheeler to make some sales; that Mr. Wheeler each day had promised him that sales were about to be consummated. He had been after him constantly, and he knew, and I knew he had to make those sales, but he had been unsuccessful. He talked for some little time. I said nothing. After he got through I walked out to Mr. Skinner's desk. Mr. Skinner was also secretary of the board; and I told Mr. Skinner, 'Mr. Wheeler has a large amount of float in this Bank, you call a meeting of the board of directors immediately.' He said, 'How soon?' I said, 'Just as soon as you can get them.' This was Wednesday morning. I knew that Mr. Spaulding usually was in Salem on that day, and it might take a little time. So I went immediately from there to Mr. Morden's office. Mr. Morden is my co-trustee in the Pittock Estate, and I told Mr. Morden what I had learned. I went from his office into Mr. Pittock's office—Mr. Pittock was one of the directors—and told him. I didn't go back to the Bank until about four o'clock in the afternoon, at which time Mr. Olmstead met me and said he wanted to talk with me. I failed to say that I had

(Testimony of O. L. Price.)

asked Mr. Skinner to notify Mr. Olmstead that I had called a board meeting. Mr. Olmstead said, 'Mr. Skinner tells me that you have asked for a board meeting.' I says, 'Yes.' Well, he says, 'When are you going to have it?' I says, 'Just as soon as we can get it.' He says, 'I wish you would wait until Wheeler can get back; Wheeler is in San Francisco, and I want him at that meeting.' I says, 'How soon can he get here;' he says, 'I was speaking to him to-day, and I told him he would have to come, and he will be here Friday morning on the early train.' I says, 'This is all right.' I told Mr. Skinner then to make that call of the board for nine o'clock Friday morning. Friday morning when—

Q. Before you get to that, state whether or not any instructions were given to discontinue accepting for immediate credit any more checks deposited in the McCormick Lumber Company account? [549]

A. No instructions were given until the meeting on the 11th, or Friday.

Q. Go ahead.

A. Mr. Wheeler came to the Bank. In the meantime I had asked Mr. Olmstead to get for me as nearly as he could the exact amount of this float. He said he would have to get it from the bookkeeper, Mr. Wheeler's bookkeeper. On Friday morning when Mr. Wheeler came in I asked him if he had a list of these amounts, and he said approximately, and he and Mr. Olmstead were working on

(Testimony of O. L. Price.)

this matter until about eleven o'clock, before the Board actually met. Before the meeting of the Board Mr. Wheeler said that the amount was $554,000. When the Board met I informed them of the purpose of the meeting, and asked Mr. Wheeler what he intended to do about these checks as they were returned. He started in talking about sales he was just about to make, the redwood sale, and we called him away from San Francisco; he thought he had a sale for this Trask timber, and undoubtedly he would very soon make a sale of the Telegram. I told Mr. Wheeler that he didn't have time to make sales, he would have to arrange to get that money quickly some other way; and I suggested to him that this was a time he would have to call on his family. He said that he couldn't talk to Biff, his brother, and the only one he could talk to was William, who was then in San Francisco. I asked him to talk with William, and he said he didn't like he was working on this redwood deal, which sale certainly would be consummated in a few days. After a considerable discussion—Mr. Olmstead had asked me what was to be done—I said we would pay no more; we would give him credit for no more such checks. Mr. Olmstead wanted to know what we would do about the checks that were coming back, and I told him if he can't take them up they will have to go in the usual course. He says, 'Do you realize what that means when this amount of checks comes back to this bank?' I says, 'Yes, I fully realize it, and we will take our medicine now.'

(Testimony of O. L. Price.)

The meeting adjourned after a considerable discussion. The next day was a holiday, February 12th, Saturday. On Monday morning [550] when we expected William Wheeler up here—we had asked for him to come—Mr. Wheeler came in and we asked where William was. He said he wasn't coming yet. We asked if he had talked with him; he said, 'Yes, I talked with him over the phone Friday, but he wouldn't come.' I asked him if he had told him of the difficulty he was in. He said, 'No, he couldn't talk over the phone.' And then from that time on we were working with Mr. Wheeler, Mr. Olmstead and myself, trying in every way possible to see if we couldn't raise a sufficient amount of money to meet this float.

Q. During the week following February 12th you think you were in constant touch with Mr. Wheeler in an effort to get him to do something?

A. Constantly.

Q. And during that same period I assume these checks which were in course of—were in transit—were gradually coming back.

A. They were coming back. I asked the auditor to advise me on it as rapidly as they came back, so I would know the amount.

Q. And when they were all in they amounted to what? A. Almost $800,000."

The discovery referred to in the foregoing testimony put an end to the plan for the organization of a liquidating company. It had become evident that instead of raising $750,000 in cash for the sub-

(Testimony of O. L. Price.)

sidiary it would be necessary to increase the cash capital so to be raised by $800,000, and this seemed impossible.

It was next suggested that an effort should be made to sell the Bank. The witness while calling on Mr. Wright of the United States National Bank on another matter was asked whether or not the Pittock Estate was attempting to purchase additional stock of Northwestern National Bank so as to get control, indicating that if a sale was being considered the United States National Bank would be interested.

Thereupon the witness undertook negotiations with the officers of the United States National Bank but later found that Mr. Olmstead had already [551] begun to negotiate with the officers of the First National Bank. A tentative agreement was reached which specified a price for deposits and for the building of the Bank subject to an appraisal, and the question then considered was the amount of assets which could be turned over to the First National Bank to offset the deposit liability. Thereupon some of the junior officers were sent to the First National Bank with a list of principal loans which were examined and appeared to be satisfactory.

During these negotiations the indebtedness created by the McCormick Lumber Company returned checks was not disclosed, but as the transaction neared a final agreement witness felt it necessary to disclose the facts regarding the McCormick

"float," explaining that the Northwestern would of course diminish the fixed price to the extent of the assets required to be applied to offset the "float."

These negotiations continued until about the last Sunday in February, 1927, when they were discontinued because of the demand that $2,250,000 would have to be put up in cash in addition to the assets of the Bank, and because of the refusal to pay the agreed percentage on deposits or any except those which remained after the lapse of one year.

During this period the board of directors of the Northwestern National Bank was in almost constant session; and when witness reported the last demands the board concluded that inasmuch as two million to two and a half million would have to be advanced in any event, it would be better for the stockholders of the Bank to put up this money themselves and continue in business. In view of the rigid examination which had just been made and which had disclosed that the addition of a million and a half would be ample to permit taking out of the Bank's assets all criticized paper, the directors concluded that the addition of two million dollars would be ample to put the Bank in excellent condition, notwithstanding the addition to the frozen paper resulting from the McCormick "float." For this reason it was decided that if two million dollars could be raised by the stockholders, the Bank should not sacrifice the earning value of the business by a

(Testimony of O. L. Price.)

sale but should continue the conduct of the business of the Bank.

Two methods of procedure were discussed. One was to organize a new Bank under the laws of the State with the two million dollars capital and to purchase the business of the Northwestern Bank, and the other was to put the money into the present [552] Bank in the form of an assessment and continue under the old charter. The latter plan contemplated an involuntary assessment on the stockholders if money could not be secured by voluntary subscription; and any involuntary assessment to raise two million dollars would require a finding by the Comptroller that the capital of the stock had been impaired to the extent of 100%; otherwise the assessment could not legally be enforced.

At the meeting of the directors just referred to, held late in February, 1927, the directors determined to secure subscriptions immediately for the two million dollars required whichever plan might be finally adopted; and almost the entire two million dollars was actually subscribed that same night for use in carrying out whichever of the two plans might be adopted.

At the conclusion of this Sunday night meeting the plan which was favored was that of organizing a new State bank, but when the board reconvened the next morning, the members having given serious consideration to the matter, came to the conclusion that this was not advisable. There was some doubt of the legal right of the trustees of the Pittock

(Testimony of O. L. Price.)

Estate to subscribe for stock of a new Bank, whereas they felt themselves authorized to subscribe for whatever might be necessary to protect the investment in the existing Bank. It was felt also that the McCormick "float" of $800,000 would soon become publicly known and that the organization of a new State Bank would advertise to the world that there was a crisis in the affairs of the Bank; and it was thought that change from a national bank to a state bank would be considered a showing of weakness. The existing Bank was a member of the clearing-house and also of the Federal Reserve Bank and it would take some time to have the new Bank admitted to these organizations. There was an indebtedness of about a million and a half to the Federal Reserve Bank which would have to be paid at once if the present institution were liquidated.

For these and other reasons it seemed to witness that the better plan was to continue the operations of the present Bank, arranging for an assessment of 100%. The witness had confidence that most of the stockholders would pay their assessment voluntarily and some of the stockholders would be willing to advance enough to pay the assessment of those who could not pay at once, taking over the stock of these stockholders but giving them an option to repurchase within a year providing they could then pay their assessment.

After full discussion the board of directors reached the conclusion that the plan for continuing

(Testimony of O. L. Price.)

[553] the existing Bank and making a 100% assessment should be followed. Approximately one million dollars in cash was raised immediately and a writing was entered into under which those signing agreed to advance another million dollars. The local Bank Examiner, Mr. Crowley, was then called in and he outlined the manner of putting through the assessment.

On that same day and after the money had been raised, the board was called together, Mr. Olmstead presented his resignation, and the witness was elected president in his place.

In order to consummate the plan thus adopted, the board then requested the federal authorities to make another examination of the Bank so that the Comptroller would be in a position to certify that the capital was impaired to the extent of 100% and the Bank thus placed in a position to levy an assessment.

Thereupon an article was published in the morning "Oregonian" which told of the fact that the Pittock Estate had acquired a larger share of ownership in the Bank and that this would give the Pittock Estate a greater interest in the conduct of the affairs of the Bank.

Thereupon an examination was made of the Bank by Examiner Crowley and Chief Examiner Harris. These Examiners had considerable difficulty in convincing themselves that the assets were impaired up to the full 100% but they did complete their examination and make a report to this effect in

(Testimony of O. L. Price.)

order to permit the Bank to carry out the plan for a 100% assessment. Before this was done, however, a vigorous effort was made to interview the stockholders so as to persuade them to a voluntary assessment and thus avoid the necessity for a formal levy by the Comptroller.

The board of directors appreciated that Mr. Olmstead's resignation would cause some withdrawals of deposits and an effort was made at once to get into the best possible condition for such withdrawals, by calling in notes and getting clear of indebtedness to the Federal Reserve Bank. This was accomplished by the middle of March so that from then on there was nothing owing to the Federal Reserve Bank.

Presently the directors learned that there were rumors afloat of a defalcation in the Bank and efforts were made to explain this to people who had heard about it.

There was only a slight decrease in the deposits until the last four or five days before the [554] Bank closed. But there were no withdrawals sufficient to cause any alarm until the last four or five days. In the latter part of March witness went to San Francisco in order to discuss with Mr. Fleischhacker the question of the assessment on the stock held by Mr. J. E. Wheeler and Mr. Olmstead, which stock was hypothecated with Mr. Fleischhacker's bank at San Francisco. Witness also planned to go to Los Angeles to talk with complainant Ballin about the assessment on his stock.

(Testimony of O. L. Price.)

While at San Francisco witness also called on the Portland Dollar Lumber Company in the effort to collect a substantial amount of money owing the Bank, and also called upon the Southern Pacific Company and the Standard Oil Company and obtained a promise for an increase in their deposits.

On Friday of the week of this trip witness received a telephone call from Vice-President Skinner of the Bank saying that there were bad rumors afloat and that the town was being honey-combed with calls over the telephone about the condition of the Bank. He advised also that there had been some noticeable withdrawals although they were not then alarmed. After further telephone conversations witness decided on Saturday to give up his Los Angeles trip and return at once to Portland, which he did arriving home Monday morning.

There were no indications of trouble until about 10:30 when a crowd began to assemble in the Bank. Witness thereupon went to the United States National Bank and met with officers of that Bank and at his suggestion prepared a letter to the president of the Portland clearing-house asking for an immediate conference.

It was impossible to get this conference arranged until 3:30 in the afternoon, and by this time the Bank quarters were badly crowded with people seeking to withdraw their deposits.

The clearing-house after a meeting which continued until 5:00 o'clock, came to the conclusion that it could not get behind the Bank.

(Testimony of O. L. Price.)

The Bank remained open for the payment of depositors until about 6:00 o'clock in the afternoon and there were large crowds waiting when the Bank closed for the day.

At a subsequent meeting on the same evening with the officers of the First National Bank and the United States National Bank, an agreement was made by the terms of which these two Banks undertook [555] to assume and pay the deposit liability of the Northwestern National, provided they could be secured by a transfer of a sufficient amount of assets, supported by individual guaranties and backed further by the guaranty of the Portland clearing-house. This agreement was reported at once to the board of directors of the Northwestern National and it was the unanimous opinion that the agreement would have to be made and the guaranties given whatever sacrifice might be required, in order that depositors could be paid in full and without delay.

The offer of the two Banks was conditioned upon their approval of the sufficiency of the assets of the Northwestern Bank, to be determined by an examination made during the night following. Such an examination was begun by the officers of these two Banks about 10:30 or 11:00 o'clock that night and was concluded between 7:00 and 8:00 the next morning. The two Banks required, in addition to the transfer of the assets, that the one million dollars which had been advanced by some of the stockholders several weeks before in anticipa-

(Testimony of O. L. Price.)

tion of the proposed assessment, should remain in the assets to be transferred, and that the additional one million dollars theretofore agreed to be furnished by the stockholders for the purpose of assessment, should be paid in in cash immediately, and in addition that a guaranty of two million dollars be given to be signed by the Pittock Estate and the directors individually, and that the legal liability of the stockholders would remain unaffected. It was also stipulated that the Bank would be required to discontinue business and liquidate.

These conditions were acceded to and agreements and guaranties prepared and executed, and about 10:00 o'clock in the morning notices were posted that the deposits of the Northwestern Bank were unqualifiedly guaranteed by the First National Bank, the United States National Bank and the Portland clearing-house. In addition, statements were made to the assembled crowd be representatives of the three Banks, but notwithstanding these assurances, the run on the Bank continued that day and for two or three days thereafter.

Excellent results have been obtained from the subsequent liquidation of the assets of the Bank. The values thus demonstrated justified the opinion held by the directors that the Bank with the two million dollars additional capital advanced after the McCormick "float" was discovered, was in excellent condition.

"Witness, Edgar H. Sensenich, was an officer of the Northwestern National Bank from 1912 to

(Testimony of O. L. Price.)

1923, occupying the position of vice-president at the time of severing relations in 1923.

"Whenever a borrower established a line of credit, the handling of the loans to that borrower usually worked into the hands of some one of the officers. This was true as to any substantial line of credit. In this way the Wheeler and Telegram lines fell to Mr. Olmstead to handle.

"From the time of Mr. Pittock's death in 1919, and continuing until 1923, the board of directors each year was getting sharper and sharper in the handling of loans, urging the officers to be more active in the collection of the loans which had become slow or bad following the war period. There is no question that a more vigorous policy was constantly being developed." [556]

PRICE upon cross-examination testified (1054) among other things that the liquidation had been in charge of Mark D. Skinner, one of the officers; that he himself was appointed liquidating agent by virtue of his position as president but had not been active in the liquidation but had appointed Skinner as his deputy. That the first capital stock of the Bank as of the time witness was attached to it was $1,000,000, with $250,000.00 Surplus, and thereafter the stock was increased to $2,000,000.00 and they sold stock at $150.00 per share and $400,-000.00 went into Surplus and they charged off to Undivided Profit account certain amounts. That all of the stockholders did not contribute to the

(Testimony of O. L. Price.)

$150.00 amount, and that just left those who didn't subscribe to hold the same certificates they had before and the others took additional certificates practically the same, because whoever took the additional stock took it as they found the stock then, at $150.00 a share. That what he meant by "war period" was the time the United States entered the war, in 1917, until the signing of the Armistice November 11, 1918, but that there was a great money inflation following the war as there was during the war—that in speaking of the war period which he said affected his Bank was the time we were in the war, to the signing of the Armistice. Witness' attention was called to the testimony of Mr. Sensenich, and that he had testified with respect to the condition of the slow loans and frozen assets of the Bank during the war period, that the condition continued the same down to the time he left the bank in 1923, and he stated that that was what he meant as the period of deflation, and that it still continued, according to his views, as far as the Northwestern National [557—205] Bank was concerned, for a period of seven years. That he did not recall any suggestion of change in management of the Bank prior to 1922, and that prior to the leaving of the Bank by Mr. Sensenich in June, 1923, they had had that point under discussion, as well as many others in relation to what might be to the best interests of the Bank; that the first discussion of change in management was in the fall of 1922, but that was not taken up di-

(Testimony of O. L. Price.)

rectly with the board of directors; that he discussed the matter with various members of the board as to what might possibly be for the best interest of the Bank, and this was following the time when some of the loans became slow and they had to cease paying dividends; that it was finally concluded that change in management was not necessary or advisable—that these matters were discussed with Mr. Charlton, Mr. Metschan and Mr. Spalding, he was not certain that he had talked to Spalding, but remembered discussing it with Charlton and Metschan. That in 1923 it came up again, but it was finally determined that Olmstead was the proper man for the place; he didn't recall having discussed it again until the meeting of June, 1926, the time with the Comptroller at Washington. That the loans he spoke of as affected by deflation were renewed from time to time, but continued down to the period of deflation and the executive committee thoroughly discussed these matters, and that the high peak in loans adequately secured was about $15,000,000.00. (R., 1060.) When his attention was called to the published calls, say commencing in 1922, the witness answered that it must be remembered that they were at their lowest at that time, because that was the deflation period that he spoke of, that the [558—206] loans he spoke of were always carried in Loans and Discounts, as the statements were made and amounted to the same thing he referred to when he spoke of Notes and Discounts. That all of their

(Testimony of O. L. Price.)

profits were charged up to take care of losses determined by the Examiner after they ceased to pay dividends in 1920; that the executive committee met every Tuesday and discussed loans and renewals, then passed their conclusions on to the board, who passed on them, and they were recorded at their regular monthly meetings. The witness was not pleased with the sale of the Menefee and Standifer and Jones stock to Wheeler because he thought that that sale interfered with his negotiations to sell the Bank. It did not occur to his mind as to the fact that there was engendered opposition between the element of the presidency of the Bank, and the witness representing the Pittock Estate at that time. (1063.) That he and Olmstead were always extremely good friends and as far as he knew that friendship still existed, but that his eyes had become entirely opened in the last few months,—were apparently not at that time (1923) that he had every confidence in all the officers of the bank; that he never figured at any time that he had control beyond the Pittock Estate, the Pittock heirs, handled by himself and Mr. Piper—that that was the only stock he ever attempted to sell, and didn't want any effort to make any sort of combination because he didn't think that was necessary, and he didn't suppose any was being made against him. That Wheeler had had very extensive transactions with the bank prior to 1923, and that he knew generally the condition of affairs, that they were discussed often; that Olm-

(Testimony of O. L. Price.)

stead had told him where Wheeler got the money [559—207] to pay for the stock, at the same time that he told him of the purchase, that Wheeler had bought the stock and had borrowed the money from the Anglo bank with which to pay for it, and had paid the sellers cash. That between the years 1923 and up to the first Otto report in August, 1924, they were anxious to have the Wheeler obligations paid although at that time they thought they were perfectly good, but he never discussed the matter; that there were none of them that were anxious to loan Wheeler money in recent years; that the Wheeler loans were criticised by the Examining Committee in 1924, and the Bank didn't want to lend him any more money, but wanted him to clean up his obligations, and it was at that time that Wheeler and his line were considered to be in charge of Mr. Olmstead, and that he Olmstead had handled it from the start and was continuously reporting what success he was having to the board, and there were criticisms made of the Wheeler loan in 1925; that most of the conversations they had were with Olmstead and not with Wheeler, as to the condition of the Wheeler loans, and they relied principally upon the reports which they got from Olmstead each week, although some of the directors may have talked directly to Mr. Wheeler —the witness did not recall that he had talked to Wheeler about it until after February, 1927, and when he talked to McIntosh in June, 1926, about the change in management, he had a copy of the last

(Testimony of O. L. Price.)

examination, the letter, before him and they asked just what he meant by that and he said of course he meant a change in the presidency; the witness did not recall that he said why, and could not recall any conversation with Metschan, or Stewart, that he had had as to why he recommended the dismissal of Olmstead, but presumed it to be because of the unsatisfactory showing that the [560—208] Bank had made in the last few years. Witness did not recall whether or not he had communicated to Olmstead what the Comptroller had said about the change in management, but of course Olmstead had seen the criticism. That it would have been somewhat embarrassing to him to have spoken about it, since it had been decided that it would not be wise to make a change as Olmstead was thought to be the person who could more readily get the subscription of $37.50 per share out of the stockholders, and to assist in working out the matter, getting the new corporation worked out; that they were anxious to have Wheeler pay up, and the Wheeler line was one of the objects of criticism as having been carried too long at that time. That the letter of April 26, 1926, was the letter to which he referred, and as to what he meant as written by the Comptroller, and that the witness hesitated to speak about the matter, and did not recall any of the directors speaking to Olmstead about it, as they did not want to discourage him in putting his full heart in the work in regard to the corporation. Witness did not remember

(Testimony of O. L. Price.)

whether he wrote a letter or sent a telegram back to Washington stating that it would be all right for Mr. Olmstead to go ahead and see the stockholders. That they returned by way of the Canadian Pacific and took a little longer, and were working at all times as soon as they got back, which was the first part of July or the latter part of June. That Mr. Stewart came directly home, and could report what they did at Washington before they did and then Mr. Olmstead started in to see the stockholders, witness presumed that was instructions, in a way, but stated of course the main thing, the big thing, was to [561—209] get the $37.50 from Mr. Wheeler; and that was working along until the examination in September, and they went to San Francisco to meet the Comptroller on December 20, 1926, at which time they met Mr. McIntosh and Mr. Harris, who had with them the September 21, 1926, report. The witness did not remember that the question of a change in management of the Bank was discussed in that conference; that when they came back from the December 20th visit, they reported immediately to the board concerning the $1,500,000.00 to be taken up. This was the latter part of December, and in the meantime they had made provision to take care of the stock; some of the Pittock heirs had agreed that they would buy from those who did not want to pay the $37.50, paying them a limited amount, $120.00 or $125.00 per share, so that they could get behind those who did not want to put up the $37.50.

(Testimony of O. L. Price.)

That prior to the first of January, 1927, he did not recall that anyone had put up any money, but that one or two had sold their stock and their may have been some reason that they didn't want to put it up, was the reason they sold, as he presumed, and he referred to the Lindner sale but did not know of anyone else. That on or about the 8th of February, 1927, it was discovered that the $37.50 plan was impossible and couldn't be worked out on account of finding the float, and they had to raise the $1,500,000.00 for the plan, and when they discovered this, in addition to the $800,000.00 more in cash, made it impossible; that the whole takedown was gone as to their program with the Comptroller, and it was found that the money required would be the same as they had originally planned and what the Wheeler float amounted to. (R., 1075.) [562—210]

That on the Sunday night or Monday, before the first of March, 1927, they agreed to get together and put up $2,000,000.00 because the deal with the First National Bank was off on that Sunday, and the next day Olmstead resigned, and witness fixed the meeting as in the evening of February 28th, Olmstead resigned March 1st, 1927. And that the meeting when they discovered the float and involving the instructions given not to carry any more Wheeler checks was February 11, 1927. That Wheeler was present, also Olmstead, at the February 11 meeting, and Wheeler told the witness that the amount overdrawn was $554,000.00 and

(Testimony of O. L. Price.)

Olmstead told him that it was more than that, and told Wheeler he would have to get the money; that that was the first time the board, also, had told Wheeler he would have to get the money, for the float and there was no previous occasion when the board had told Wheeler that he would have to pay up, and the first time Wheeler had ever appeared before the board, that he knew of. That witness became manager of the "Oregonian" newspaper on May 1, 1927, and was on the board of the Oregonian Publishing Company before that. (1078.) That he and Olmstead worked together with the negotiations of the First National Bank and the United States National, Olmstead with the First National and the witness with the United States National, and told each other day by day how they were succeeding; the directors knew what they each were to do. That Olmstead's proposal to the First National Bank on a 3% basis continued until the witness told Harry and Elliott Corbett in Harry's office about the float, and they were to take the building with the Bank, if that was necessary. That Mr. Pittock had provided in his will that the stock of the building [563—211] should not be sold unless the bank stock had previously been sold, or unless both were sold at the same time; but that conditions did not exist in 1927, due to the fact that it had been eliminated in the previous building transaction that Mr. Olmstead described in his testimony, and the Pittock Estate had sold its stock in the building company to the Bank so

(Testimony of O. L. Price.)

there was no question that could be set up over the Pittock Estate matter that the First National Bank could have said it couldn't take the building; that that was owned by the Bank at that time. (1081.)

AT THE REQUEST OF MR. HART IT WAS HERE STIPULATED THAT THE RECORD SHOULD SHOW THAT WHEN OLMSTEAD AND WHEELER WERE INDICTED BY THE FEDERAL GRAND JURY BECAUSE OF THE TRANSACTIONS OF THE RECEIPT AND GIVING IMMEDIATE CREDIT FOR A LARGE VOLUME OF McCORMICK LUMBER COMPANY CHECKS, WHICH CHECKS WERE RETURNED UNPAID, AND THAT BOTH OF THESE MEN WERE LATER TRIED AND CONVICTED ON THAT CHARGE IN THIS DISTRICT. (R., 1082.)

Thereupon PRICE resumed the stand for cross-examination and further testified that the First National Bank finally required that in case they purchased the Northwestern, one of the things to be done would be to put up $2,250,000.00 in cash, by the stockholders, against which they might charge any rejected assets, and that was in addition to not allowing anything on deposits unless they were able to hold deposits afterward for a year. Upon being questioned as to the pool arrangement affecting other stockholders who would not participate in the raising of the $2,000,000.00 and

(Testimony of O. L. Price.)

what was to be done, the witness read from Clause 5 of the paper [564—212] produced at the trial in words and figures as follows:

"Deposits to be made in Paragraph 3 hereof shall be made on demand. The aggregate or so much thereof as may be necessary shall be used for the payment of the assessment of stock of stockholders who shall fail or refuse to pay their assessment as required by law, and any stock so purchased shall be held for the account of the person named in Paragraph 3 hereof in the proportion that the amount subscribed by each bears to the total subscription of $927,600.00." (1085.)

Witness stating that this only referred to the stockholders mentioned in Paragraph 3 who had put up the money, but refers to any stock or shareholder who shall refuse or fail to pay the assessment; that no assessment however, was ever made. That there was no writing in reference to the pool as to any other stockholders except those named, and there was no writing in relation to other stockholders whereby they became members of that particular pool, it was just determined afterwards among themselves that they would be willing to do that as an inducement to get them to come in on the voluntary assessment, as to those signers who were read into the record when Mr. Skinner was on the stand. That the only time any suggestion was ever made to any of the stockholders about a payment of any amount, was in trying to get Mr. Wheeler's stock into shape and he didn't want to turn it over under

(Testimony of O. L. Price.)

the arrangement witness suggested, and witness suggested that if he were not willing to do that, they might give him a nominal sum, say $10.00 a share for his stock—that there was no other stockholder to whom the $10.00 per share offer was made. (1078.)

That two other large depositors of the Bank outside of their own group referred to by the witness, brought to the witness the rumor of the defalcation, and witness had told them of the fact and what had been done to provide money for protecting the depositors. That [565—213] the agreement read into the record by Mr. Skinner expressed the whole thing, in writing, and they wouldn't release the statutory liability of the stockholders, that that was held in addition to the guaranty, and besides that they wanted their undertaking to these two particular Banks for whatever might be found wanting after they got through with whatever they were doing.

That the witness is a lawyer and was admitted to practice in 1900; that the first information he had of the total amount of the float transaction was during the criminal trial. He remembered a figure involving something like thirteen millions of dollars, during the period which was in question, but also recalled that there was a considerable amount of these transactions that were redeposited, and a very large amount of returned items, and also some that were paid. Mr. Morden went with him to the clearing-house and was there with him all the time of the first meeting, when he was explaining condi-

(Testimony of O. L. Price.)

tions and endeavoring to get help. That the rapid growth of the Bank, the peak of the transactions, noticeably commenced in 1914 and ran up to 1918 or possibly 1919. Witness was asked if he recalled along about May 25, 1926, before he went to Washington, that the assets objected to ran to an amount of three million and some odd thousand dollars, but stated that he did not recall the amount of assets that were objected to, he knew that in all the reports there were many items that were criticised, and when his attention was called to the Harris report of March 5, 1927, wherein Harris pointed out to him specific losses of $634,500.00, witness answered that the report would show that, but he had forgotten, that it was a considerable amount, but [566—214] that he didn't remember the amount; that it was very likely, as overdue paper often amounts to considerable where people were getting renewals on it. His attention was then directed to the Harris report and the Wheeler lines outside the float, as far as estimated losses ran, $1,496,000.00 and some odd, and he was asked whether he recalled that amount outside the float of $800,000.00, and he stated that the total estimated losses were approximately two million dollars. The witness was asked if, when Harris got down to the place where he was computing the Bank's total condemned assets or total criticised assets, he took a total of practically two and a half millions of money, and he answered "Practically. He was making—he was preparing for this 100% assess-

(Testimony of O. L. Price.)

ment which we requested." Witness was asked, "And you recall, don't you at that time, that Harris showed that Capital, Surplus and Undivided Profits, applied against what he computed, left the Bank insolvent by several thousand dollars?" and he answered that Harris had made that provision. He didn't know anything about Complainant's Exhibit 11 or Exhibit 60. (1095.)

Upon redirect examination of this witness, he stated that at the time of the Harris examination of March 5th there had already been put up a million dollars and another million had been pledged, by him and the stockholders and directors acting with him, before the examination of March 5, 1927; that it was the purpose of the Harris examination of March 5, 1927, to provide for a certificate of impairment of the capital so that they could make an involuntary assessment. That he presumed the Bank might have had an opportunity for enforcing the Wheeler loans, but that they did not think it advisable [567—215] to go to that extent by bringing suit. That Olmstead was constantly being urged to get money from Mr. Wheeler and to get payment of the notes, and he, Olmstead, was very active indeed in trying to make collection, and in doing so, in trying to assist Wheeler in making his various sales. (R., 1097.)

Upon recross-examination (1098) witness said he wanted to think that Olmstead's intention in his deal with Wheeler was to work out the Bank, as it

(Testimony of O. L. Price.)

was "awfully hard for him to believe that Mr. Olmstead, in whom he had the greatest confidence, and one of his best friends, would have any other intention." The witness recognized the letter sent on March 18, 1927, to the Comptroller—that it bore his signature and that of Charlton, Metschan, Stewart, Skinner and Collins. That there never was any involuntary assessment really levied, but it was the intention to make all preparations for an involuntary assessment and they wanted it if they fell down on obtaining the money on a voluntary assessment, —that is, if the stockholders did not contribute enough, then they wanted to be in position to go ahead and enforce it. That the two million dollars that was put up prior to Harris' report of March 5th, 1927, involved the item on the March 2, 1927, entry of $926,600.00; that the book entry was $7,500.00 over and was part of the two million that had been arranged for, and that included the first million. That the witness *believe* that the paper having regard to the other million was signed on the 2d of March, 1927, the date of the entries, but was not certain of the date. [568—216]

TESTIMONY OF CHARLES H. STEWART, FOR DEFENDANTS.

CHARLES H. STEWART testified that he was one of the vice-presidents of the Northwestern National Bank and had been such vice-president since January, 1921, up to the time of its discontinuance

(Testimony of Charles H. Stewart.)

in the banking business. That he had been with the Federal Reserve Bank in San Francisco, and formerly was a state bank examiner, and that he had worked in contact with a great many banks and was a man of wide experience, and had a full knowledge and familiarity with the banking business. That he was "contact officer," with the other officers and directors, of the Northwestern National Bank, and participated in the handling of slow or frozen assets, from 1922 to 1926 that the board of the Bank was just about as active as a board of directors who were not active officers of the Bank, could be. That they met regularly, their meetings were well attended, and they were in and out of the Bank almost constantly. That the executive committee met practically every week, and went into things very closely, although it was not a formal type of meeting. That the directors were unusually active, unusually energetic, unusually diligent, during the entire period under consideration, in the performance of their duties, and gave consideration to the problems of the Bank went out and investigated various securities, went and investigated different pieces of property and made recommendations as to what should be done about them. That Mr. Metschan was particularly active in going down and looking over the Merchant's National Bank property and that the executive committee functioned on loans in connection with the larger and active accounts, and passed [569—217] lines of credit for the guidance of the officers to make loans to

(Testimony of Charles H. Stewart.)

these particular lines, and the larger lines of credit were established by this executive committee That his contact with the Examining Committee was only in their investigation of loans, because that was what engaged him in the Bank, but he thought the Examining Committee met with regularity twice every year and spent a considerable time in the Bank, their examination being under the guidance of the auditor, and clerks furnished by him, and they went at their work very, very thoroughly. That they used to take the loan drawers, at the time, and take them upstairs in the directors' room and go through them, and ask for the collateral supporting each loan, and that their examinations lasted over periods of ten days, and they were very conscientious but that they could not be expected to take hold of an adding machine and list thirty thousand accounts in the Bank, that they were not technical bankers, but these three gentlemen had been directors in the Bank long enough and members of the executive committee and examining committee, that they had a very good idea as to loans and credits. That he was certain that the minutes would probably reflect the proceedings as far as definite action was taken, and that the corporate record reflected all the activities of the board of directors, but that the discussions lasted for three or four hours and could not very well be recorded on two or three pages in a minute-book. That further than that there were a great many not full meetings of the board, but a great deal of dis-

(Testimony of Charles H. Stewart.)

cussion as between the directors and officers that were not had at any formal meeting. That the board of directors were very active and very conscientious, in his opinion, [570—218] and they were in the Bank at other times than meeting times. That there never was a known impairment of the capital stock, surplus or undivided profits, and he didn't think there was ever an Examiner's report except the last March 5th report, 1927, that indicated an impairment. That he thought there was one letter read into the evidence from the Comptroller wherein he suggested something about an impairment, but his Examiner's report did not show an impairment and if there had been an impairment of capital, it would have been incumbent upon the Comptroller to assess them immediately, and he never suggested an assessment— that is statutory, he would not have any option in the matter, if a bank's capital is impaired the Comptroller must levy an assessment—and he didn't think that any Examiner's report during the time he was there showed any losses that were not properly charged off at a called meeting of the board of directors. That there never was any suggestion, prior to March 5, 1927, that an assessment might be made. That he thought there had been more slow loans and losses in Banks in the United States since 1920 than there ever was in any one period, and consequently more Bank failures and assessments and everything else. That there were two years in the history of the Northwestern National Bank when it was rated as

(Testimony of Charles H. Stewart.)

the most rapidly growing bank in the United States, but he thought the Bank of Italy had subsequently taken the palm from them. Witness didn't give the figures exactly, but believed that in 1915 the Northwestern had $5,000,000.00 deposit and that in the two successive years thereafter it practically doubled. That it ran up to $28,000,000.00 deposits in 1920, which of course was a period of rapid [571—219] growth because commodity prices were very, very high and if a man owned any kind of merchandise the value thereof doubled, the sale price doubled, and his banking account increased and the Bank deposits in the United States as a whole increased very rapidly, in fact, they inflated during that period. That the Northwestern Bank grew very rapidly, more rapidly than was the average growth, and that it was very flattering at the time, but he thought it was a very unhealthy growth, because when deflation came and the recession in deposits started, and that also was very general, the recession in the Northwestern was very large, more heavy than was the average recession of deposits during that period. That in June or July, 1920, when things began to smash, the Northwestern Bank had $19,000,000.00 in loans and $28,000,000.00 in deposits, and in two years' time the twenty-eight million deposits shrank to $16,000,000.00, the loans necessarily contracted and they were forced to borrow money from the Federal Reserve Bank, with the result that unquestionably the proportions of slow loans in the Bank was

(Testimony of Charles H. Stewart.)

greater than could normally be expected in a bank with $16,000,000.00 deposits, because in the rush to take of the $12,000,000.00 loss in deposits that occurred in two years' time, collection had to be forced where it could be forced, and the finest and best notes that were in the Bank were necessarily called to pay off these deposits to what they were in 1922. That the Bank found itself a Bank with proportionate frozen loan account of a Bank of $28,000,000.00, but with actually only $16,000,000.00 deposits earning capacity, to absorb the losses that developed in a bank of $28,000,000.00, and that the condition that confronted them was a very serious one. [572—220]

That the officers and directors met the situation with what success that their ability would permit, that they worked hard at it and that they succeeded. He didn't think there were many moves made wherein they made any very grave error, that looking back a serious mistake was made, they knew, in advancing money to the Dufur Orchards but they had every reason at the time to believe that it was a proper move. That they succeeded from that period in getting back to $20,000,000.00 deposits, and were making money, not as much as they should have made because of a large amount of assets which were not producing income. That Cash Items consisted of checks drawn on an outside or a local Bank on which money had been advanced, or checks cashed after the clearings, on other Banks in the same city, and just as many were cashed on out-

(Testimony of Charles H. Stewart.)

side places, as inside. That all of those items were lumped in one or two accounts, either exchanges for clearing-house, which represented items drawn on Banks in the city of Portland, which had been cashed but too late for clearing, and the other was Cash Items. That the only effect of figuring out Cash Items against Reserve would be that if they were given credit for these checks, then they would be required to keep a greater reserve because the deposits would have increased by having given credit for those checks; so the only effect or reserve of Cash Items, would be that they would be required to keep more cash in the Federal Reserve Bank. That the Item of Cash, or Cash Items, or anything of that sort, does not enter into the figure of the Federal Reserve Bank at all, that the amount of the reserve is gauged by the deposits. [573—221]

That with respect to the loan to Wheeler the Bank's records show that in 1925 an additional loan of $150,000.00 was made to him, and that witness was present at the meeting at which that loan was authorized; he couldn't remember to what extent the question of making an additional loan was discussed by the members of the Committee, but testified he knew that if Wheeler applied for additional credit, there would have been considerable discussion, as he knew there was in this particular instance and he remembered what the terms were himself; that Mr. Wheeler offered the Bank what they thought was a very desirable bunch of collateral, which applied to the new loan as well as all

(Testimony of Charles H. Stewart.)

other loans direct and contingent that he might have had in the Bank, and it was thought to be good business to advance the additional money and get the excess of collateral. That that was the exercised judgment of the members of the board and of himself as a director of the Bank, at the time the loan was made, and he knew that to be so.

"A. Well, in the first place, of course all loans that were made were reported to the Executive Committee for their approval or disapproval, subsequent to the time that they were made, but the Executive Committee, in order that they might have something to say about the loan before it was made, on all of our larger accounts and active accounts, passed lines of credit for the guidance of the officers, the authorized loan officers, to make loans to these particular lines up to a certain fixed amount. I think we went through to the point of establishing lines of credit even though they had not been asked for, on the possibility that they might be, and it would be inconvenient for us to tell them we couldn't do business until our Executive Committee got together; we passed lines down as low as $25,000 to all customers that we thought there would be the prospect of an application for credit from, so that if such customer came in, unknown to him he had already been passed [574—222] on or before he made his application for loan. And of course the larger lines of credit were established by the Executive Committee."

(Testimony of Charles H. Stewart.)

Witness collaborated the testimony of Price as to the plan of forming a subsidiary corporation to take out from the Bank's assets a million and a half dollars worth of slow paper, and stated that he was one of the committee sent to Washington to interview the Comptroller, and later accompanied Mr. Price to San Francisco, in December 1926, to interview Mr. Harris and the Comptroller. That he didn't believe there was any delay in putting the plan suggested by the Comptroller into effect, and there was no delay except that someone had to interview the stockholders and obtain their consent to the plan, and the directors felt that they would be in better position to get that consent to the [575—222–a] $37.50 per share plan, if they could say to them that having done this the bank would be clean and would then meet the approval of the Comptroller; that while they did not have the final consent, Mr. Olmstead interview a great many people, but they could not go to the stockholders who were not particularly cognizant with the affairs of the Bank, and make this assurance until they had the definite approval of the Comptroller for the plan, and they didn't get that before the meeting in San Francisco with the Chief Examiner there, when the witness and Mr. Price went down there; that they came back to Portland with that consent and ready to complete the transaction as rapidly as possible. They got the Comptroller's consent about December 20th, and they were given until April 1st, 1927, to complete it, at least a period of months,

(Testimony of Charles H. Stewart.)

and that Mr. Price's understanding of the matter was the same as his. That there was nothing astonishing or alarming about a "float." That a "kite" is an unholy float, but that anywhere up to around $2,500,000, or $3,000,000.00 would be a normal, proper and unavoidable float in a Bank the size of the Northwestern; that a kite is a float which is created for the purpose of getting credit on a float. Then by question and answer the witness testified as follows:

"A. Now the conventional type of float is not carried on as by somebody inside the bank and somebody outside the bank, but some individual that circulates checks around two or three banks and he gets his deposit which is created in one Bank through a check drawn on another Bank, and then he floats one into that Bank before the check drawn on it gets through, and he floats up an available credit for his use without actually having anything in it; that is the conventional kite; and I have testified or referred to this transaction in our own Bank as a kite, because it accomplished the same purpose. In other words, a credit was created through checks that were being floated that were not ultimately paid, but it differs from an ordinary kite in that it isn't one individual doing business in two or [576—223] three Banks, but it was carried on inside and outside the Bank . . . it is customary for a depositor of a Bank to get credit on his outside checks; it is the excep-

(Testimony of Charles H. Stewart.)

tion when he does not. Of course he wouldn't get credit—the mere fact that he was depositing in a Bank would not entitle him to credit in a large amount unless the people to whom the check was referred believed that everything was all right, that he was good for it." (R., 1120, 1121.)

Witness admitted that Hoyt told him about July 23d that the Wheeler items were coming back, but he had no recollection that he told him again, and was inclined to believe that Hoyt was mistaken in the fact that he told him of any accumulation when he (Hoyt) testified that he had told witness on July 23d of a considerable amount of items that had been returned on the Wheeler account, that it was his rememberance that Hoyt did tell him and that he went immediately to Olmstead with it and informed him. Witness couldn't remember the details of his conversation except that Olmstead gave him a very satisfactory explanation of the situation, which had to do with a bond issue on either the McCormick Lumber Company or the Trask, he didn't remember which. That Olmstead explained that the bond issue had been negotiated, and witness believed that the money was to have gone to William Wheeler, and Jack Wheeler had been authorized to draw but for some reason his draft or checks had gotten there too soon and were returned; that the money was available, and he had obtained the credit and everything was all right. That the drafts were taken up at the time, he couldn't say as to the checks, but

(Testimony of Charles H. Stewart.)

that they were removed from the Bank to his satisfaction.

By question and answer the witness told in his own words of his subsequent knowledge as follows: [577—224]

"Q. Now it was testified to by Mr. Hoyt that again in August he called your attention to the fact that there was returned checks, and said he gave you the amount. What is your recollection of that?

A. I don't believe he testified to that. I think he said were items in a certain amount, because if he did testify he gave me the amount I think he was mistaken, because if he had given me that amount I think I would remember it. It was an impressive amount. I think Mr. Hoyt probably did mention the matter to me some time subsequently that checks were back from Wheeler and I believe I am right in that, because he was doubtful himself; because I subsequently talked to Mr. Hoyt, and he said he was not certain that he had fixed any amount. My reason for believing he didn't is that I think I would have remembered it, it was an impressive amount.

Q. What information did you have during the period from July or August on, until the early part of February, with reference to the return of McCormick checks?

A. Well, I should say that during that period I knew of instances of McCormick checks, or Wheeler checks—I don't know what they were stated to

(Testimony of Charles H. Stewart.)

me—having been returned three or four times, probably from Mr. Bates and Mr. Hoyt, and I had discussed that matter with Mr. Olmstead. Mind you, these would be very widely separated times. He has explained to me that he was drawing against confirmed credits that were confirmed by wire, and was some slip up that was taken care of, and explained it to my satisfaction at first.

Q. And why do you say at first?

A. Because later I became suspicious something was under cover.

Q. When were your suspicions aroused for the first time, and what caused them to be so aroused?

A. Well, in February, early February; and I—

Q. February, 1927?

A. 1927. And looking backward, if I may digress, I have an idea that that was due to the fact that Mr. Wheeler was in San Francisco, and that his man up here didn't function quite as smoothly as he did. Because very apparently checks in large amounts began to come into the Bank along at that time, and I think probably Mr. Bates got alarmed about it, and came to me, and I asked him if this had been happening, and he had some considerable amount of Cash Items. I asked him to go to Mr. Horstman and get me a list of items not in Cash Items, but items that were outstanding in that account. When I got that list I felt something was wrong.

Q. And did you go to Mr. Price?

(Testimony of Charles H. Stewart.)

A. I talked first with Mr. Skinner, and we together talked to Mr. Price. I think Mr. Skinner had got some kind of an inkling of the same thing.

Q. You heard the testimony of Mr. Price as to what—as to the conversation between you on the subject?

A. Well, I don't remember the definite conversation. I know that I gave Mr. Price to believe that I felt something was wrong.

Q. Prior to this occasion in early February, Mr. Stewart, did you at any time have any intimation of any continued practice of the deposit of McCormick checks drawn for immediate credit, and the return of these checks unpaid? [578—225]

A. Oh no; I didn't know certainly over a period of eight months, until right at the end of February; I hadn't had my attention called that there was even a check returned—my attention was called to it three or four times during the period of eight months, and that was not a matter of any suspicion or alarm to me that a man's checks might come back.

Q. Was there anything occurred at any time during this period that created any suspicion in your mind as to the integrity of any executive officer of the Bank?

A. I never entertained such a suspicion until the time that I related, when I got that list, final list. Before that I didn't know what I suspected, but I felt uncomfortable.

Q. You have given us an explanation of the ac-

(Testimony of Charles H. Stewart.)

count called 'Cash Items' in the daily statement, but I want to ask you to go one step further and tell us how that account might vary in total amount, and for what reasons?

A. The injection into the business right at the closing time of items too late to collect." (R., 1123–24–25.)

The witness then continued to testify that his attention was never called at any time during the Bank Examiners' visits to any irregularity or suspicion of irregularity with reference to accepting checks or Cash Items, and stated that the Bank Examiner didn't find out about it any more than he did. That he participated in the discussion of a state Bank, that he didn't know that he had advanced reasons for or against the adoption of that plan at a board meeting, when it was first suggested, that the directors were in considerable distress at that time and something had to be done, and this plan seemed a way out, that it more or less had the approval of the men who were assembled in the office that night, but the next day when they came in, witness was entirely of the notion that it was not a feasible plan and he argued it to the Board that he didn't think they should do it; that Mr. Price seemed of the same opinion, that he had arrived at the same conclusion; that their reasons against it were that they were up against recapitalization of the Bank, it didn't make much difference [579—226] whether they formed a new Bank or whether they injected new money into the old Bank.

(Testimony of Charles H. Stewart.)

That they had to furnish capital and take over assets and assume the liabilities of the old Bank eliminating assets that would offset capital and surplus, and the chief thing to him was that they were trying to avoid publicity, that they didn't want people talking about them; that it was the conclusion of all of them that to switch a Bank the size of the Northwestern to a state Bank would have required explanation to 30,000 people, whereas if they got by with a voluntary assessment nobody but the stockholders need know, and even if it came to an involuntary assessment and were forced to publish notice for the sale of the stock for non-payment of assessment, the proportion of people that would read those little advertising notices was very, very much less than those who would know of it if the Northwestern switched over to a state Bank over night. That they were desperately afraid of rumor, and felt that publicity attached to the float was something that they couldn't stand, because they knew they were in distress; that they were at that time borrowing from the Federal Reserve Bank a million and a half dollars and if they switched to a state Bank they would have lost their membership in the Federal Reserve Bank—that they were borrowing on 15 days' time which put them up against the necessity of paying these various notes off as they matured, as well as sacrificing the source of further borrowing in case there should be some reaction to the plan, so they changed

(Testimony of Charles H. Stewart.)

their notion and decided on the assessment of the stock, which didn't prove successful, but witness didn't think then and still didn't think that they made a mistake. He didn't think any of them wanted to go [580—227] ahead after the meeting that night. (1128-29.)

TESTIMONY OF FRANK C. BRAMWELL, FOR DEFENDANTS (IN REBUTTAL).

In connection with this testimony of the witness Stewart, FRANK C. BRAMWELL was called in rebuttal and testified as follows:

"Questions by Mr. BRISTOL.

Mr. BRAMWELL, in 1927, in the month of February, 1927, what office did you hold in this state?

A. Superintendent of Banks.

Q. Would you be the person before whom ordinarily application would be made for the organization of state institutions and trust companies taking over national banks or any other institution?

A. Yes, sir.

Q. You may state whether or not, and if so at what time, you ever had any conference with Charles A. Stewart, of the Northwestern National Bank?

A. Yes, I had a conference with Mr. Stewart.

Q. Do you recall, as near as you can, for the Court's advice and information, when it was, and tell him what took place?

(Testimony of Frank C. Bramwell.)

A. I am not prepared to state the exact date, but it was just prior to the time the Northwestern National Bank was having difficulties.

Q. Do you recall whether it was before Olmstead —we have it here in evidence that Olmstead went out as president March 1st, and Mr. Price went in as president, I think, on that date. Now was it before or after that?

A. My recollection is that it was very shortly after Mr. Olmstead resigned, practically at the same time, I think.

Q. What took place, please?

A. Between Mr. Stewart and myself?

Q. Yes.

A. He got me on the telephone one morning, at my residence, and asked me if I would drive by his place and bring him over to town. I told him that I would. When he got in my car he told me that they were endeavoring to untangle the affairs of the Northwestern National Bank; that in discussing the matter they had practically decided to convert the national Bank into a state Bank, and asked me if I would be agreeable to this program, and if I was, that they would like to obtain a charter for the new Bank, without any delay. I asked Mr. Stewart just what the program was, and he said that the intention was to convert to a state Bank, an institution under the name of the Northwestern Bank, with a stock of approximately $2,200,000. I think was $2,198,000. He had a slip in his hand, and showed me just what the figure

(Testimony of Frank C. Bramwell.)

was. I recall that they were approximately $2,200,000, and that this amount had been subscribed by the directors and stockholders, which would constitute the capital of the new Bank, and that the state Bank would take over the deposit liabilities and all of the assets of the Northwestern National Bank, as an offset to that amount; that would leave the state Bank with two million capital, and about $200,000 surplus. He asked me if I would expedite the matter and issue a charter immediately upon application. I told [581—228] Mr. Stewart that I rather hesitated to issue a charter unless he had a proper amount of assets in the Northwestern National and have a reasonably intelligent view as to what we were doing. Mr. Stewart said that he would show me that if a conversion should be made on that basis that the new state Bank would be in a satisfactory condition. I told Mr. Stewart that I rather hesitated to proceed on that theory, although I presumed that he knew what he was talking about, from the fact that he had been a Bank Examiner, and had also been manager of a Federal Reserve Bank, and had had banking experience; but even in view of that situation, that I would not care to act until I knew more about it. He said that he could guarantee to me that if this program should be followed, that the affairs of the state Bank would be satisfactory although there might be a few items that we would object to, and that they could be taken care of within a very short time from the opening of the Bank. I told

(Testimony of Frank C. Bramwell.)

Mr. Stewart that I would not give him a definite answer until I discussed the matter with Mr. Hickok, my assistant. I went down to the office and discussed the matter with Mr. Hickok, and we concluded and I so notified Mr. Stewart, that we would not issue a charter until we first had opportunity to examine the assets of the Northwestern National Bank.

Q. That conversation you are quite sure occurred in the morning of the day that Mr. Stewart suggested it?

A. Well, the conversation took place while we were driving from Mr. Stewart's residence over in town; we parked in front of the Northwestern National Bank for a few minutes, and talked there.

Q. But it was in the morning of the day, whatever day it was?

A. Yes; and the question of converting to a state Bank had been discussed the previous evening with the directors of the Northwestern National Bank, and Mr. Stewart, so he informed me, had been requested to discuss the matter with me along the lines I have just briefly indicated." (R., 1238, 39, 40, 41.)

TESTIMONY OF CHARLES H. STEWART, FOR DEFENDANTS (RECALLED).

CHARLES H. STEWART continued to testify on direct examination, that the directors were just groping for some way out, that they were almost constantly in session, with innumerable meetings night and day, and he didn't think any one of them knew a single thing about the float or kite until they were called down into the basement of the Bank to the directors' room and Mr. Price talked to them about it, and that was on the 12th or 13th of February, 1927. That Price's testimony about it was in accordance with his view of the matter. [582—229] That he remembered that at the meeting before he went with Mr. Price and Mr. Skinner back over to the clearing-house, they were urging that the Bank had to meet any terms that were presented to us; that it didn't make any difference how difficult they were, they couldn't allow the Northwestern National Bank to suspend payment; and that the witness felt that chiefly for the reason that he was charged in that Bank with handling the accounts of what they called the country banks, meaning banks out of Portland, and in other parts of Oregon, Washington and Idaho, of which there were from 125 to 150, which carried practically their entire reserve with the Northwestern Bank, and if the Northwestern had suspended, they would have had to suspend, and the effect would have been that the Bank would have gone through a liquidation in the

(Testimony of Charles H. Stewart.)

hands of a receiver, and he would have been confronted by the demands of depositors for early settlement, and the receiver would no doubt have sacrificed the Bank's assets and failed to realize on them as completely as the Bank had and would realize on them; and it was the witness' firm belief, when giving his testimony, that it would not be necessary after liquidation to assess the stockholders of the Bank and that the money that the directors had advanced would be returned; and he was very certain that there would be no stockholders assessment. That the report made by Mr. Harris and his deputies in March, 1927, after examination made at request of Bank in order that in case the Bank failed to put over the voluntary assessment, it could fall back on an involuntary assessment, and it must have a certificate of impairment from the Comptroller before they could levy such involuntary assessment, and funds were provided and waiting *to put* in when the machinery was put through; that Mr. Harris wanted to co-operate with them, was trying to help, but [583—230] he, Harris, had considerable argument with his conscience before he consented to furnish them with a certificate; that he frankly told witness that he couldn't make such a certificate, that the Bank was not solvent, but finally proceeded along those lines and said, "Well, the emergency demands it, and I will do it." That he was averse to including in the losses or bad loans assets which did not exist, but finally did it because the Bank insisted, and if they were going

(Testimony of Charles H. Stewart.)

to be subjected to the possible publicity and embarrassment of an involuntary assessment of the Bank, they wanted to do a good job of it while doing it. (R., 1134.)

Upon cross-examination, witness STEWART testified that he couldn't answer whether a certificate of involuntary assessment had been issued or not, that he had never seen it he could swear to that, and that he didn't know whether there was such certificate in existence or not. That he knew officially what Harris did, it wasn't hearsay; that Harris had no more right to issue a certificate of involuntary assessment than the witness did; that the terms imposed by the clearing-house are in the contract, the ultimate terms, in writing; he knew that the examination was completed and the Comptroller said he would issue the permit, but that the clearing-house never got to any terms at all; all witness knew *was the* ultimate result was the direct action of the First National Bank and the United States National Bank, but the clearing-house guaranteed them against loss. He couldn't answer as to whether the clearing-house meeting were informed of what he characterized as the "float," but that Mr. Price and Mr. Morden went there in the morning and Skinner and the witness went in the evening, with Mr. [584—231] Price, and when he was asked about the facts affecting the condition of the Bank which were disclosed to the clearing-house, in the discussion he had, he responded:

(Testimony of Charles H. Stewart.)

"Oh, I can't answer that; I don't remember; I don't remember. Of course you will understand that Mr. Mills and Mr. Ainsworth and their immediate associates in their banks, knew of this float, and I have no doubt that they had apprised the other members of the clearing-house of that condition, although I don't remember that it was discussed that night. . . . " (R., 1137).

The attention of witness was particularly called to the examination by Otto, by Wylde and by Harris, and he was asked if he knew whether these matters were ever discussed by them with Olmstead, affecting the affairs of the Bank which witness said were in Olmstead's charge, and he stated that he heard him at the close of every examination go over in the presence of the board and in Mr. Olmstead's presence as a member of the board, practically all the matters that he had already criticised. That the Wheeler lines were unquestionably discussed in the presence of all of the examiners. That he had Bates go over and get the Cash Items of a large amount, when his suspicion *were* aroused early in February, and that he got the last list of Cash Items from Bates about the 7th or 8th of February, because it was two or three days just prior to the meeting of the 11th. He couldn't remember what took place in the meeting with Wheeler, but Price presented the proposition; couldn't remember what Wheeler said, but thought he was asked for the specific amount of his overdrafts, and Wheeler gave an incorrect one, but witness couldn't remember

(Testimony of Charles H. Stewart.)

exactly, that Wheeler talked freely, and was told he would have to get the money forthwith to pay up his loans, and witness had reason to believe that Wheeler was often asked to do this. That from 1921, the time he went with the Bank, on down to [585—232] the time when he was in the Comptroller's office, he didn't think he ever heard of any suggested change in the management of the Bank; that the Comptroller wrote them a letter prior to his trip to Washington in 1926 and he thought rather suggested a change, was not specific, the witness amended, but that he was quite specific in Washington, giving as his reason that he felt that the Bank had not made the progress they should have in cleaning up the slow stuff that they had, and believed they should have a new president. That the entire blame or criticism for the slowness was laid to Mr. Olmstead.

'Q. Did you ever know of any previous demand having been made on Wheeler to pay up?

A. You mean to pay up his loans?

Q. Yes.

A. Why, I have reason to believe that he was often asked to do it. He was never formally sued.

Q. No, no, but you know what I mean; who would do it?

A. Mr. Olmstead would have done it, and I am very certain that he did, because it was generally *understand* among our directors that it was desirable that Mr. Wheeler reduce his lines there in the

(Testimony of Charles H. Stewart.)

Bank; and I am very certain that Mr. Olmstead conveyed that to him many times.

Q. Now, one question going back. Did you go into this element of practice that Mr. Hart was interrogating you about? In case a customer received credit on a check on and out of town bank, if the person to whom the check came for approval believed it to be ultimately payable, it would be the bank's practice to pass it for credit, would it not?

A. Yes; not the teller, however.

Q. No, no; did you ever hear during the time that you were there, from 1921 I think you said, of any suggested change in the management?

A. No, I don't think I ever did until I was in the Comptroller's office.

Q. What did the Comptroller say about it? That is, McIntosh, when you were in Washington in 1926.

A. I should amend that; he wrote us a letter prior to that, and I rather think suggested a change. He was not specific. He was quite specific in Washington, in discussing a change in the management.

Q. Did he give his reasons?

A. He felt that we had not made the progress we should have made in cleaning up this slow stuff that we had, and believed that we should have a new president. [586—233]

Q. Well, in other words the entire blame for the slowness, or criticism, or whatever you call it, was entirely laid to Mr. Olmstead?

A. Well, he chose to hang it on him; I don't think fairly; I would not want to suggest that Mr. Olm-

(Testimony of Charles H. Stewart.)

stead did more than share the blame in the apparent slowness in the collection of these assets, because I think it was an almost impossible task; the Comptroller was perhaps impatient with him, and he rather insisted that he was to blame. I don't believe that either Mr. Price or I felt that it was entirely a proper criticism." (R., 1142, 1143.)

That the calls that were made and published by the Bank in the newspaper, "The Oregonian," were not in response to the Comptroller's demands, and were the same thing as sent to the Comptroller, they were supposed to be exact copies. That the reason why there were peculiar conditions in Portland that affected this Bank were described by the witness as follows:

"A. . . . We had had three Banks in Portland for a generation or two, and here came a new Bank which offered opportunity for anybody that had been affronted, or for any imaginary or other reason didn't like the other banks, he had a chance to move in on the new one. They had never had that opportunity before, and there was a considerable growth. I might say further that in the establishing of a new bank like that, that we are not apt to get the best accounts from the other banks; that the grade of accounts that were naturally attracted to the Northwestern were not exactly the best; it couldn't be otherwise. A man who is entirely good is usually entirely satisfied." (R., 1144.)

This witness had studied law, had been with the Federal Reserve Bank for several years, and had an

(Testimony of Charles H. Stewart.)

intimate familiarity with the National Banking Act and with the Federal Reserve Act; he testified that the reason which most affected him personally in not wanting to change to a state bank, was the publicity, he believed, but that was only a guess—that the large [587—233-a] amount they had laying with the Federal Reserve Bank, if it had been picked up on short notice, would have caused them embarrassment.

TESTIMONY OF MARK SKINNER, FOR DEFENDANTS (RECALLED).

MARK SKINNER was recalled for the defendants, and testified that he became vice-president of the Northwestern National Bank in January, 1921, and a director in January, 1922, and continued to hold those offices until the closing of the Bank. That he had extensive experience as vice-president of the First National Bank in banking in St. Paul, Minnesota, and elsewhere. He explained the action of the executive committee of the Bank of October 9, 1924, in the absence of Olmstead, and stated that he had been informed by one of the clerks that checks had been returned which Wheeler had deposited with the Bank and which had been sent east, being drawn on eastern Banks, and been returned unpaid. That Wheeler came down and explained that there would probably be more of the checks back and explained it, and furthermore, he would need some additional funds and applied for a

(Testimony of Mark Skinner.)

loan of $350,000.00. It finally resulted in the Bank lending him $250,000.00, $100,000.00 of which was to be used for the McCormick Lumber Company, $100,000.00 for the Telegram Publishing Company and $50,000.00 for the Wheeler Timber Company. That Wheeler took care of this loan, or the larger part of it in 60 days, and some of the board members had objected to extending him the credit and assented only because of the necessity of the situation. That he was present at a later time when Wheeler applied for an additional loan of $150,000.00, which was authorized and actually made, after lengthy discussion. That the application was presented by Mr. Olmstead, and after due discussion it was voted upon. [588—234]

That about the middle of the summer during the year 1926 witness recalled Mr. Bates spoke to him on two or three occasions about checks of the McCormick Lumber Company coming back unpaid, but he did not at any time have any information from Mr. Bates or anyone else to indicate that there was a continued practice of acceptance by the Bank of checks for immediate credit followed by return of those checks dishonored; that witness had asked Bates if the matter was being taken care of and if they were being reported to Olmstead, and was told that they were, but witness had no talk, himself, with Olmstead, and his first knowledge that there was a "possibility" of such continued practice was when his attention was called by June Jones, vice-president of the Bank in the first week of Feb-

(Testimony of Mark Skinner.)

ruary, 1927, to the fact that while he, Jones, had been in the collection department he had seen some large items there, and said that he wanted witness to investigate for himself. He discussed the matter with Mr. Stewart over at Stewart's desk, and Stewart had just received a list of a large number of Wheeler items which had been returned in transit; they decided the matter must have immediate consideration, so they took it up with Mr. Price as chairman of the board, who in turn took it up with Olmstead. (R., 1154.) When Bates had talked to him, he said the items were coming in and were being referred to Olmstead, and that they were being taken care of. Witness said he agreed with the testimony of Price about all the transactions in February and March, 1927, and all transactions up to the end of March. That he was present on all occasions, and adopted the testimony of Price and Stewart at the trial. [589—235]

On cross-examination (R., 1155.) this witness testified that he did not recall telling any of the other officers and directors what he had learned except when he spoke to Price about the situation. That he didn't know whether Wheeler had taken the checks up or not, on the prior loan, that he told Olmstead and let it go at that, he couldn't remember what Olmstead had said; that he showed Olmstead the minutes of the meeting of October 9, 1924, held while he was away, but that there was no discussion as to how the checks were to be handled. That all

(Testimony of Mark Skinner.)

of the Wheeler guaranties were held in the note department of the Bank, and anybody who wanted to look at them, to see what was back of the line, they would make inquiry of the note department, and would be able to get the guaranties if they were there. He didn't remember when they first commenced to get guarantees from Wheeler, or in connection with the Wheeler line, and did not remember whether or not they had guaranties of Wheeler in the Bank before the meeting of 1924, that they had memoranda at various places in the Bank covering guarantees when given, and if a guaranty was requested it would be discussed at the board meetings and put in the minutes; that they had informal meetings about such things, and if guaranties were taken it didn't affect the fact whether or not it was recorded in the minutes; that witness and the directors knew that they had Wheeler's guaranty on all of these transactions, or his endorsement, that they had either or both and it was common knowledge that they had. (R., 1166.) Witness stated that he never had any occasion to talk to Olmstead about the Wheeler checks. That he had been in court all the time since the case started and heard all the testimony, and nearly every [590—236] junior officer in the Bank had been called, and they all stated that they knew about the matter in a general way but that nothing had ever been elicited to call his attention to anything irregular or out of the way, that his duties were largely confined to loans and matters of that character, policy

(Testimony of Mark Skinner.)

of the Bank. He explained the action of the board at the meeting of October 9, 1924, as having been taken up by himself when Olmstead was out of town, but stated that there weren't any other times when Olmstead was away that he could recall, that his recollection was sound and true about that. That he did not mention what he had learned from Bates to Olmstead, but stated that the Wheeler lines were in constant discussion with him, as well as every officer and director in the Bank. That he did not know that the McCormick Lumber Company account was in the Bank at the time, or had been reopened. That witness bought the Morden stock in August, 1922, August 23d, and paid $125.00 a share for it. That he was secretary of the meeting of the executive committee on May 31, 1924, at which there was a discussion of notes and loans, and it was discovered that there was an excess loan to George H. Kelly, one of the members of the board, which had been made the previous week, and that it was immediately corrected; that during this same period, March 10, 1925, a large loan had been made to Charles K. Spaulding Lumber Company, the same Spaulding who was a director and defendant, and that witness was on the committee at that time. That a line of credit was also extended to Oregon Pulp & Paper Company in large amount, and that Mr. Spaulding, director-defendant, was one of the stockholders of that company. That on October 10, 1925, there was another large loan made to director Spaulding. [591—237]

(Testimony of Mark Skinner.)

That the loan limit of the Bank from 1922 on was $240,000.00 to any one person, and that was what Spaulding got in March, 1925, and Oregon Pulp & Paper Company got $150,000.00 and again on October 20, 1925, the C. K. Spaulding loan was $158,000.00; that all of these loans were paid. Witness was shown Complainant's Exhibit 60 and stated that it bore his signature. He did not remember the date, couldn't recall the date, couldn't remember the date, couldn't recall any conversation with Olmstead about it. (R., 1168.)

TESTIMONY OF E. S. COLLINS, FOR DEFENDANTS.

E. S. COLLINS testified that he became a director of the bank in 1923, that was his recollection; was a lumber and timber man, also actively engaged in manufacturing and was affiliated with a number of different concerns. Went on the board of the United States National Bank in January, 1928

(R., 1169). That as a new member of the board of the Northwestern National Bank, he did the best he could to learn the duties of his office and see how things were going, and found soon that things were going as well as he could have suggested himself, about all there was for him to do was to follow the crowd and go the way they went; that before he went on the board he thought they were inclined to be too sanguine and too careless, but when he

(Testimony of E. S. Collins.)

came on the board he found them to be very conservative indeed, and very active. That he attended a number of the executive meetings, to inform himself of the affairs of the Bank, but never was on the Examining Committee; that the board was doing things so well that there was nothing for him to criticize. That he went to the Bank frequently and talked matters over with Olmstead, and talked very freely about the Bank's difficulties as he showed them to witness, [592—238] and they tried to devise ways and means to better the condition of the Bank. He saw the other directors who were not on the Examining Committee or Executive Committee and who are co-defendants in the case, in the board meetings, and they seemed to be fulfilling their functions very fully indeed, just as well as he was himself; couldn't say what the other men were doing but witness was trying to find out what was going on and trying to function properly and see if he could add anything to what the others were saying and doing, but found that he could not in most cases. That he exercised his judgment in matters with which the board was dealing during the period from 1923 on, and the other directors exercised their own judgment, or did the best they could. That he had known J. E. Wheeler and his family since he was a small boy, and was better acquainted with his timber holdings than any other member of the board; that he had personally investigated the Redwood region in California, and was fairly well informed as to the values and class

(Testimony of E. S. Collins.)

of investment that Wheeler was interested in. That he conferred with Olmstead, and they exchanged notes as to what they both knew and thought about the Wheeler property, and what might be done as to thawing out some of Wheeler's excessive loans and things of that kind; witness gave especial attention to that. That Olmstead had told him, or Olmstead believed or it was commonly accepted, he had forgotten which of the three, that Wheeler had a net worth of four million dollars, but witness was satisfied he was not worth that much, although he thought Wheeler was worth more *more* money than he owed the Bank or anybody else, and supposed his account was perfectly secure, although slow and he knew it had been criticised, but [593—239] witness wanted to see him pay it—not that he was afraid of the security however. He discussed the sale of the "Telegram" with Olmstead number of times. That witness did not want Mr. Wheeler to be compelled to give an option for the sale of the "Telegram," as he thought the Wheeler family would help him out of his difficulties; that witness had been very anxious to have Wheeler sell some of his property and security and pay out, but that he wanted him to sell something else than the "Telegram." That witness took the matter of paying up with Wheeler a number of times, and always advised Wheeler to sell something, timber, lands, or some of his security and get on easy street. That it was never brought to a vote at any board meeting whereby witness was called upon to express

(Testimony of E. S. Collins.)

himself definitely and finally on the subject of forcing Wheeler to sell the "Telegram," and so far as he knew, no actual sale of timber was ever interfered with by anything witness said or did. That the first knowledge he had of the McCormick float was early in February, 1927, at a meeting so called at which Mr. Olmstead confessed to the matter and explained it to them; that prior to that time Mr. Wheeler had his implicit confidence. That witness had full confidence in every board member, and didn't question anything which was put before him by the Examining Committee or the Executive Committee, that he didn't question them being facts. (R., 1176.)

On cross-examination of this witness, he testified that he first became a stockholder in the United States National Bank of Portland, Oregon, in the spring of 1923. The stock he acquired in the Northwestern National Bank was more than the stock which he had in the United States National. Most of his stock was bought [594—240] in the year 1923, and that he had paid $140.00 per share then for his Northwestern stock, he thought he paid $137.50 for some of it and afterward bought some of the stock for less than that, but the close price was around $140.00, that his recollection was definite that in 1923 was from $137.50 to $140.00. That witness' talks with Olmstead were irregular but frequent, he was very busy with his own affairs, and at times it probably might have been as long as a

(Testimony of E. S. Collins.)

month when he would not be in the Bank to talk with Olmstead specially. He did not recall that he ever had any talk with him about the rejection of the Wheeler lines by the board in 1924, and did not know what the board did at its meeting of October 9, 1924. Witness had disagreed with Olmstead as to the worth of the Wheeler holdings, and informed Olmstead of what he thought he (Wheeler) was worth; that he had considered Wheeler's timber holdings worth from one-half to three-fourths of what Olmstead thought they were—that if Olmstead placed the value at four, witness would place it at two or three. That his knowledge of Wheeler's holdings were gained before he ever went on the board; that he thought Wheeler's property was worth a great deal more than his debts, and he thought his family would help him out; that if he had been handling Wheeler's affairs, he would have handled them in a different way than what Wheeler did; that Wheeler's method of doing business with the Bank were well known, when he spoke to Olmstead, and that witness covered the whole field, as far as he could, of what Wheeler ought to do and what the Bank ought to do, and what Wheeler could do, when he talked to Olmstead. That one of witness' suggestions to Olmstead was that he, Olmstead, should use his influence to get Wheeler to offer his timber for sale [595—241] at a lower price; that Wheeler's prices were too high, and were out of consonance with the market at that time and too high to get ready sales. Wit-

(Testimony of E. S. Collins.)

ness used his best endeavor with Wheeler to persuade him to dispose of some of his holdings so as to pay his debts, but did not know whether the board knew these things or not, because he didn't talk with the board so much as he did with Olmstead. That Olmstead was a very dominating man, a man of great force, very great activity, a man who wanted to do things himself, and who understood how things should be done, and men of that type usually go ahead and do or don't do them, and to change them requires considerable effort, and sometimes a fight, and witness thought the board was inclined to let Olmstead go ahead and do things, when he was doing them right, without any interference. Witness thought it was right for them to do that. That he usually approached Wheeler with the argument that he should get a lower price for his stuff and get out of debt. Witness said he could not answer in what way the board could have expected Olmstead to get Wheeler to sell his timber, if that was what witness wanted him to do, for a less price than Wheeler wanted to take for it, and couldn't remember whether Olmstead had ever told him in his talks that he could or would collect Wheeler's loans. Witness was quite sure that Olmstead told the board that if Wheeler didn't pay up he would call his loans, but couldn't remember whether it was voted on, or what action was taken, and did not know what the board wanted with respect to taking extreme measures with Wheeler. That he talked with one

(Testimony of E. S. Collins.)

or two of the members of the board about it, and they rather weakly expressed the same sentiments as himself, but he wasn't sure whether they really [596—242] meant it or not. That the ones he spoke to about it were Mr. Metschan, and probably to Mr. Spaulding as he talked to Spaulding a great deal about the affairs of the board, but he wasn't sure of Mr. Spaulding, and he was not at all sure that Mr. Metschan expressed himself as favoring the things he (witness) did; he could not recall what was said by either of them, but that what witness said was that Wheeler ought to be required to sell some or all of his timber but that he should not be forced to sell the "Telegram" first; that witness wanted him to be forced to sell something else besides the "Telegram," if force was to be used. Witness said he would rather not answer the question as to why it was that he didn't want Wheeler to sell the "Telegram" if there was an opportunity to do so—that he talked it over with Metschan, was not quite sure he had talked it over with Spaulding, not sure of talking of it to anyone else. That the conclusions of the three of them as to whether or not the "Telegram" should be sold were noncommittal—there was no agreement; witness was sure how he felt, but wasn't sure how they felt, and did not remember what idea they had expressed, either of them, at any meeting, as to Olmstead forcing the sale of the "Telegram"; he did not remember at all.

(Testimony of E. S. Collins.)

On redirect examination this witness knew that Mr. Wheeler in 1926 and the early part of 1927 was endeavoring to complete a sale of the redwood timber in California; he couldn't express an opinion as to whether or not the attempts were based on a price which should have moved the opinion, but thought the difficulty at that time was that he was asking too high a price, that he believed a sale could be made at a fair price, he [597—243] wasn't sure that he knew what he was talking about, that was only his opinion. That witness never missed any of the full board meetings of the Bank. He put up 100% of his stock on March 1st, 1927, and again the night of March 29, 1927, and besides that signed a $2,000,000.00 guaranty fund, and that he knew what he was signing, too, and during those occasions used his best judgment of what he thought was for the good of the Bank. (R., 1189–90.)

On recross-examination (1190) witness testified that he was present at the meeting when the State Bank organization was discussed, before Olmstead resigned, and he was also at the meeting that night, and that most of them that participated, when they separated that night thought that was the best possible way out; that when they next met, however, Mr. Price came in and stated that he didn't think it advisable to go ahead with it, and then they all thought and felt the same way Mr. Price did, after thinking it over more closely. That Mr. Olmstead was a factor in the discussion, that he was still

(Testimony of E. S. Collins.)

president of the Bank when that discussion took place,—witness was sure of that,—and that Olmstead wanted to go through with the plan, he seemed to, at least that was his attitude. That about a year before the Bank closed, witness went to see Mr. Ainsworth and mentioned the matter and talked with him about it, and Ainsworth told him that the United States National Bank was not interested in buying the Northwestern, that they didn't want to see the Northwestern bought out, didn't want to see them quit business and discontinue, that Portland needed the Northwestern and they wanted it to remain—that they were not in the market to buy it. That to the best of witness' [598—244] recollection that was some time in the winter or spring of 1926; that that talk was had by witness personally, and no other Bank official was present; he was not sure he had communicated that afterward to anybody else of his fellow directors or officers. Witness didn't know anything in a similar way about a previously suggested sale to the First National Bank, he didn't know the First National crowd well enough to talk with them confidentially. That when witness got on the board in 1923 he heard of a suggestion as to change in the management of the Bank, that he was opposed to a thing of that kind, for although he didn't consider Olmstead a perfect president of the Bank, he didn't know where they could get anybody any better nor as good. Witness couldn't place the time nor the date, as to when he

(Testimony of E. S. Collins.)

first heard the suggestion of change in management. (R., 1194.)

Thereupon it was stipulated for the defense that Exhibit 1 might be received in evidence, with a tabulation of directors' meetings from January 13, 1920, the date of Metschan's election, together with the meetings of the Executive Committee from the time of the election to the time the Bank closed, showing the board meetings at which he was present and those from which he was absent. The total showing of directors' meetings at which he was present was 95 out of 108, and out of 378 meetings of the Executive Committee he was present at 326. With regard to Mr. Spaulding, out of 62 directors' meetings he was present at 60, and out of 224 Executive Committee meetings he was present at 216. These were segregated as to years. [599—245]

TESTIMONY OF PHIL METSCHAN, FOR DEFENDANTS.

PHIL METSCHAN was next called for the defense, and testified as to his connection with the Imperial Hotel as president and active manager; that he became a stockholder of the Northwestern National Bank in 1918 and a member of the board of directors in January, 1920; that he was elected to the Executive Committee soon after that, and became acquainted with the fact that the Bank had certain slow and undesirable paper, but that he

(Testimony of Phil Metschan.)

thought practically all of the items which have been mentioned in the bill of complaint in this case, were going accounts at the Bank at that time, but that trouble commenced to develop at the Bank in 1921, and the situation became known to the board of directors of the Bank through the inability of their borrowers to meet their indebtedness when it became due. The board went to work to improve that condition, and adopted a very conservative policy, watched everything very carefully and acquainted themselves with collateral security and statements, and with the people involved in the various concerns, and that there was a consciousness on the part of the board as to the seriousness of these conditions and the importance of them as far as the Bank was concerned, but that the members of the Executive Committee and the directors too, took a great interest in the affairs of the Bank and gave in the opinion of the witness, their best efforts all the way through. That witness interested himself in the affairs of the Bank as much as his time permitted, and endeavored to familiarize himself with the properties which it had acquired, and established a contact with the individuals personally who were indebted to the Bank, and visited various of the properties which were in question. [600—246]

That witness was very much encouraged at the development of the Bank, and believed they were building a great institution; he had every confidence in the world of the ultimate results, and never entertained any concern about the condition of the Bank

(Testimony of Phil Metschan.)

that might have been created by suspicion of any of its officers; that he had no misgivings as to any of the habits or ability or integrity of any of the officers. That the first feeling of that sort that arose was early in February, 1927, when witness was advised of the existence of a float when Mr. Price or Mr. Skinner told him, upon inquiry as to how they were progressing with the work or organizing a company to take out the frozen assets that things were not so good, that there had been developments which gave them some concern. That on the 11th of February he attended a board meeting at which Wheeler and Olmstead were present, and both made admission of the float. Thereupon witness was asked the following questions and made the following answers:

"Q. And this conversation with either Mr. Skinner or Mr. Price, as the case may be, was either the day before that, or two days before?

A. A day or so. I don't want to be positive.

Q. Up to that time you were not suspicious of any officer in the Bank? A. Entirely so.

Q. And had you discovered the existence in any way of this practice, or this method of handling checks, which created the float? A. I had not.

Q. Mr. Burckhardt, the plaintiff in one of these cases, when he was on the stand had something to say about conversations that he had had at different times with you. You and Mr. Burckhardt have been acquaintances, or perhaps friends, over a period of years, haven't you?

(Testimony of Phil Metschan.)

A. Close friends for many years.

Q. And for a considerable period of time were both interested as stockholders in the Bank?

A. We were.

Q. What is the fact as to whether you have repeatedly conversed about the affairs of the Bank with Mr. Burckhardt?

A. Up to the time of the suspension I spoke to him quite frequently. [601—247]

Q. And have you ever deceived Mr. Burckhardt in the conversations you have had with him, about your belief in the condition and position of the Bank? A. No.

Q. I asked you to make a search for correspondence that you might have had with him, after he was on the stand, and certain correspondence was introduced in evidence. Did you do that?

A. I did.

Q. And what is the fact as to whether you could find any letters, copy of letters you had written to him, or letters he had written to you?

A. I couldn't find any letters in my files, either originals or copies, but about a year or so ago I cleaned my personal files, and all correspondence that was unimportant I destroyed, and I might have destroyed the correspondence with Mr. Burckhardt.

Q. If there was an answer to the letter which Mr. Burckhardt wrote to you—by answer I mean written answer—and I want to refer, Mr. Bristol, to letter which you introduced in evidence, to which

(Testimony of Phil Metschan.)

there was no answer introduced in evidence. You remember you introduced two, one of which was answered, and one of which was not. If there was an answer to the former you have no recollection of it? A. I have no recollection, no, sir.

Q. But you have a recollection of correspondence with Mr. Burckhardt?

A. Correspondence, yes, and conversation, too.

Q. And among such conversations did you have one with him in which he sought your advice as to the sale of his stock?

A. As near as I can recall it, it was either late in 1926, or early in 1927. He discussed with me the advisability of selling his stock at a price, I believe, of $120.00.

Q. What advice did you give him?

A. I told Mr. Burckhardt we were organizing this company to take out frozen assets, and that in my opinion his stock would be paying dividends in a very few months, and would be worth much more. The Bank was making money, and was in the best shape it had ever been.

Q. Was that your belief at that time?

A. That was my belief at that time.

Q. And by your statement that the bank was in the best shape that it had ever been in, what period of time were you referring to?

A. Since the deflation, since the troubles have developed.

Q. These suspension of dividends which arose, after these bad loans began to develop?

(Testimony of Phil Metschan.)

A. Yes, sir.

Q. Did you and Mr. Burckhardt discuss at that time this proposed new corporation which involved the voluntary assessment of $37.50 a share?

A. I informed him of the proposed plan.

Q. And was any reason asked for by Mr. Burckhardt as to the necessity of the stockholders paying in $37.50 a share?

A. I explained to him that there were a number of assets that were frozen, and we would be slow in realizing on, and in my opinion they would be worth all we carried them on our books for, in some cases [602—248] more; on many of these cases such as the Michellvi Ranch paying a net income, and others would soon be paid, and we were going to put these items into this company, and felt that ultimately they too would pay out.

Q. And was there of these items, like the Dufur Orchards, as to which losses were anticipated?

A. Yes, I mentioned those things.

Q. Didn't you also have a conversation with Mr. Burckhardt about agreements among the stockholders, or proposed agreements restricting the sale of their stock? I call your attention to Complainants' Exhibits 60 and 11. I think you are familiar with the purport of them through your attendance at the trial here. Did you ever have any conversation with Mr. Burckhardt about the subject matter of these agreements? A. Yes, sir.

Q. Where did that conversation take place?

(Testimony of Phil Metschan.)

A. In my office.

Q. Do you recall approximately the time when it took place? I don't mean the time of day, but the year.

A. I don't remember the year, but I first heard of this agreement when Mr. Olmstead invited me to sign it.

Q. Was that before or after your conversation with Mr. Burckhardt? A. Before.

Q. What was any conversation between you and Mr. Olmstead in regard to that?

A. He just suggested that I sign this. He was getting up this agreement among the stockholders not to sell their stock for a year.

Q. And after that conversation with Mr. Olmstead you talked the matter over with Mr. Burckhardt?

A. The next morning, I believe, Mr. Burckhardt called at my office and asked my opinion as to the advisability of signing such an agreement. Said he had been asked to enter it. I told him that I too had been invited in, but I refused, as I remember our conversation. He said, 'What would you do in my place'; and I advised him not to sign it. Well, he says, 'I have already signed it.' I think I told him then it didn't make much difference, because I didn't believe many of the stockholders would sign it anyway.

Q. Not only with respect to these two particular agreements which you did not sign, what is the fact as to whether at any time during your ownership

(Testimony of Phil Metschan.)

of the stock in the Northwestern National Bank, you ever entered into any agreement with anybody with respect to restricting your right to sell, or the conditions under which you would sell?

A. I never made any agreement with anyone with reference to my stock.

Q. And if any combination of stockholders in that bank existed looking towards limiting the right to sell stock, you were not a party to it?

A. I never knew of any combination looking for control; as I understood this agreement—I have not read it—it was an agreement not to sell their stock. I never entered into any agreement of any sort." (R., 1200, 01, 02, 03, 04, 05.)

Witness remembered the testimony in the case as to conversation that took place at the Imperial Hotel between Wheeler, Spaulding and himself relative to the [603—249] sale of the "Telegram"; that Olmstead wanted Wheeler to sell the "Telegram"; Wheeler came and wanted to know what witness and Spaulding thought, and Spaulding told him that he wanted him to sell something to reduce his indebtedness, that they didn't care whether it was the "Telegram" or the timber, but the Bank felt that he should get busy and get rid of some of his assets and reduce his indebtedness at the Bank That a day or two later Olmstead brought the matter up at a meeting at the Bank, and assured the board that they prevented him from getting an option from Wheeler in order that he might sell the "Telegram." and not standing back of him. That

(Testimony of Phil Metschan.)

was witness' first intimation that Olmstead had any idea of forcing Wheeler—thought that was also the board's first information. Witness told Olmstead that he would never find him (witness) objecting to anything that he wanted to do to collect from Wheeler that was reasonable and sound and businesslike. That Spaulding and witness were not advised of Olmstead's plans by Wheeler or by Olmstead. Witness was familiar with the attempts of the Bank to sell out to the First National Bank and the United States National Bank, and knew of negotiations with both institutions, and that the negotiations were undertaken with the consent and authority of the board, who all realized the seriousness of the situation and were making every effort they could to conserve the company's depositors first, and the stockholders. That he participated in the deliberation that took place after it was determined that no sale could be effected to the two banks, and that the board gave serious consideration to all possible plans that were offered as affording possibilities of meeting the situation which existed. [604—250] That witness still felt confident that every member of the board was devoting practically his entire thought to the problems of the Bank during that distressing period; that witness was one of the signers to the two-million dollar guaranty that the other directors and stockholders signed, and knew what he was signing. (R., 1208.)

(Testimony of Phil Metschan.)

On cross-examination this witness testified that they *had of* changing the name of the Bank and organizing a new national bank, with a different name, and this came up during that period, but he did not recall who suggested it, it was after the failure of the negotiation with the two other banks and after they stopped, and the negotiations he referred to were before Olmstead went out as president, before February 28th. Witness fixed the place of the discussion as to the consideration of a new national bank as in Mr. Price's office in the "Oregonian" building; that they finally concluded that the best thing to do was to guarantee the Bank against loss by the deposit of money, which they had already arranged for, and guarantee the balance when required, and that was the fiinal plan that they adopted. That besides the plan of a new national bank with a new name there were no other plans such as the witness could recall except the state bank, which had been testified to at the trial, also the $37.50 assessment of 1926—that outside of that there were no other plans that he could recall, he could have remembered about them if there had been, as he was practically sleeping at the Bank at that time. That when Wheeler came to see him and Spaulding about the sale of the "Telegram," Wheeler told him that Olmstead wanted him to sell the "Telegram" and give an option on it, and he never had heard before the trial when Mr. Olmstead [605—251] so testified, that Olmstead had told him he would call his loans if he didn't sell the

(Testimony of Phil Metschan.)

"Telegram." When witness was asked to tell how well he knew Wheeler and of his affairs in connection with Bank, he testified as follows:

"A. I found the Wheeler line in the Bank when I went on the board. Up to that time I had very slight acquaintance with Mr. Wheeler. I informed myself on the Wheeler lines as best I could, familiarized myself to a certain extent with his holdings, in fact have been in some of his timber. I formed the conclusion that Wheeler was a very wealthy man, and never believed that the Bank would lose anything on the Wheeler lines. The Wheeler lines, as the record will show, consisted of several accounts; they were not all J. E. Wheeler; was the 'Telegram,' the Wheeler Estate, the Wheeler timber, and L. R. Wheeler; and I never had any question about their ultimately being paid. The board was constantly endeavoring to get reductions on the Wheeler lines. There was the McCormick Lumber Company account in there also when I went in the Bank, but it secured a liquidation of the McCormick Lumber Company account, and after the McCormick line was paid the account was closed. Immediately thereafter the board, or the president, acted to continue this work to liquidate other Wheeler accounts. We were endeavoring particularly to get the J. E. Wheeler notes out of the Bank; we felt that the Wheeler Estate and the Wheeler Timber Company could be—that is my own belief —could be allowed to run until we had liquidated these more urgent accounts. As far as

(Testimony of Phil Metschan.)

the 'Telegram' was concerned, I always felt it was a good account, a going concern, and entitled to a line, although I wanted to see that paid also." (R., 1211.)

That witness did not consider the Wheeler lines desirable accounts because there were no balances. That Wheeler was not a satisfactory customer because he carried no compensating balances, and witness was constantly on the alert watching every opportunity to see that his accounts were removed from the Bank. That witness disbelieved in Wheeler —in his financial management, didn't believe he knew how to manage his affairs and wanted to see him pay, that he was involved in so many companies with minority holdings that it was a difficult matter to secure liquidation, and they had to nurse him along, and witness considered him undesirable—an undesirable account but thought Wheeler was absolutely solvent. [606—252]

That witness told Wheeler, after the discovery of the float in 1924 that he felt that he (Wheeler) had deceived them, and witness would not vote for him to secure any further credit. When witness was reminded of his testimony in the criminal trial, at which he testified that he had told Wheeler when the first float had been discovered that he (Wheeler) would never get a dollar from the Bank as long as witness stayed on the board, he replied that he had just testified to that. That witness was asked if he recalled his testimony in the criminal trial concerning the same situation, and answered:

(Testimony of Phil Metschan.)

"A. Well, I can't say I was expecting it to go through, because our experience with Wheeler had been so unsatisfactory that they—Wheeler was in Los Angeles or San Francisco in January, pretty nearly all of January trying to close a deal on the redwood timber.

Q. He was away? He expected to get $800,000.00 by that deal and you all expected that deal to go through, didn't you?

A. I was hoping it would.

Q. Well, you all expected it to?

A. Well, I can't say I was expecting it to go through, because our experience with Wheeler had been so unsatisfactory that they had to show me, when they had any deal with me.

Q. You wouldn't believe it until you had the money? You didn't believe anything Wheeler said? A. Not very much.

Q. You asked him to dinner the other day, didn't you? A. No.

Q. Here in the courtroom?

A. No, I said 'You better go to dinner.' I didn't ask him to dinner.

Q. You talked with Wheeler a good many times during the summer of 1922, didn't you?

A. With reference to the affairs of the Bank?

Q. Yes.

A. I can only recall once or twice that I ever talked with Wheeler with reference to the Bank. He called on the Bank on one or two occasions when

(Testimony of Phil Metschan.)

we were in session, and I met him occasionally around the Bank.

Q. You believed in him as long as he was publishing the 'Telegram,' didn't you?

A. I told Wheeler at the time of the float—I said I didn't altogether believe in Wheeler. I said I began to disbelieve in Wheeler at the time I introduced that resolution—(evidently referring, I think, to October 9, 1924)—I told him then myself that I had no confidence in him because he deceived us." (R., 1213, 1214.) [607—253]

Witness said he recalled that testimony, and that he hadn't changed his mind since, regarding the float, but that he regarded Wheeler's account as perfectly safe, if that was what was trying to be found out. The witness then by question and answer testified as follows:

"Q. No, I am not. I am asking you individually, as a director, at the time you received your experience with Wheeler, what you knew and ascertained, whether you didn't express yourself as heretofore, that you didn't believe in Wheeler?

Mr. HAMPSON.—He didn't say that. He said not very much.

Q. What I have read to you?

A. I believed Wheeler's statements as far as his resources were concerned, because we had evidence that he had these properties, and I believed they would be worth practically what he thought they were, what he said they were; but I was not in favor of advancing him any more money.

(Testimony of Phil Metschan.)

Mr. HAMPSON.—Do you mean 1924?

A. 1924.

Q. You made another loan after that, didn't you, in 1925? A. Well, the Bank did, yes.

Mr. LOGAN.—That was the loan they got increased security on?

Mr. BRISTOL.—Yes, a lot of collateral. They said they wanted to cover another loan, and all that. I remember all that, and I guess everybody else does.

Q. There is no dispute about this letter you wrote Burckhardt, that was introduced in evidence, is there? A. No.

Q. I think you must have misspoke yourself when I asked the question; when Mr. Hampson first asked you whether your hotel business didn't occupy you to the exclusion of everything else, you didn't mean that, you meant it the other way around, that you gave more attention to the Bank than you did to the hotel business, didn't you?

A. I did for the last year or two.

Mr. HAMPSON.—That is exactly what I asked, but I think it probably true Mr. Metschan did give more attention to the Bank than he did to the hotel business.

Q. Yes; and you were on the Examining Committee during these occasions, 1926, 1927 and 1925, and back there for some years? A. I was." (1215, 1216.) [608—254]

TESTIMONY OF CHARLES K. SPAULDING, FOR DEFENDANTS.

CHARLES K. SPAULDING another of the defendants, was called to the stand and testified that his business was Lumberman and that he was connected with Spaulding Logging Company; that he became a director of the Northwestern National Bank on August 31, 1922, and a member of the executive committee in January, 1923, later on in the year 1923 becoming a member of the Examining Committee. That he attended most of the meetings of the directors and executive committee—that he had no prior personal knowledge of the affairs or condition of the Bank; became a stockholder in 1920 or 1921. That upon becoming a director, the matter of liquidation of the frozen loans or assets of the Bank came up before the directors meeting and the executive committee and were given attention; that the various executive officers brought before the board the data with respect to the condition of these loans and securities, and saw them from the Examiner's reports; that the manner and means of handling the situation was discussed at every meeting more or less, and that witness tried to give the situation his best judgment and consideration, he thought they all gave their undivided attention to work out the various problems, and that witness used his own judgment in taking action on the matters that came before the board. That at times, his judgment differed from that of

(Testimony of Charles K. Spaulding.)

other members of the board and some of the officers, that that happened quite often. That the first knowledge or information or suspicion he had of the existence of the Wheeler float was some time in the forepart of February, 1927, from O. L. Price, and that was two or three days before Olmstead and Wheeler appeared at the board meeting; that previous to that [609—255] time he had had no reason or information which would lead him to be suspicious of the honesty and integrity of Olmstead, that he had full confidence in his probity and honor. That when he acted and made the examination of the Bank, together with other members of the Examining Committee during the years 1925 and 1926, they did not find any unpaid or dishonored Wheeler or McCormick items in Cash Items, and that they checked the particular items against the list or total of Cash Items so as to ascertain that they were all there. That they discussed the various loans and securities, and took them up with the note man, who usually attended the meetings when they went over that line and showed them the securities etc., and explained everything they asked for.

Thereupon the words of the Examining Committee's report were read to the witness and he was asked if he did the things it set forth in the statement and said the committee did, and they had assistance from the employees in the Bank. That he had heard the testimony of Olmstead about an option from Wheeler for the sale of the "Telegram," in the latter part of 1925 or early in 1926,

(Testimony of Charles K. Spaulding.)
and also heard Mr. Metschan's testimony as to the conversation that took place between himself, witness and Mr. Wheeler, and that that testimony was just about his understanding of their position, up in his apartment at the time of the meeting at the Imperial Hotel. That witness had no knowledge that Olmstead had told Wheeler that he would call his loans if he didn't pay up, or sue him. That no junior or other officer or other employee of the Bank ever called his attention to the fact that there were unpaid Wheeler items in the Bank, at the time he was making an examination or at any time. [610—256]

Upon cross-examination, when asked if he informed Olmstead or anybody as to when an examination of the Bank was to be made, witness said that they notified the president or Mr. Skinner; he didn't remember how many times he had informed Skinner, in 1926, or whether he told Olmstead at that time. When asked if Olmstead domineered him, whatever he did on the board, he testified he didn't know that he did any more than he did the others, that if it wasn't out of line they usually followed the president's instructions. Witness had never observed any subserviency on the part of any director as to what Olmstead wanted done, "not particularly," and did not remember of any on any occasion, about any matter. That any acts that they did they were left free to consult their own discretion and judgment about it as they

(Testimony of Charles K. Spaulding.)

saw fit, without any instructions from Olmstead, that they tried to; and that is what witness said they did.

That he was on the committee when the question of the Wheeler float came up in 1924, and his recollection was that Wheeler was away at the time, but he had had no discussion with Olmstead about Wheeler's line after that, that he could remember, alone,—that they had talked at the meetings. He could not recall any particular instructions given by him to Olmstead about what he should do concerning Wheeler, by the board or anybody else, after the October 9, 1924, meeting, no more than what that resolution applied to that was put on the minute-book at the time they made the overdraft in October, 1924. He did not recall any other time. That when the Examining Committee made its examination, every facility was placed before it to ascertain the affairs and condition of the Bank, that the Bank had and knew about. [611—257]

Thereupon Mr. HART made the following statement: "We have concluded that there is no necessity of putting on the stand any other directors. Their testimony would only be cumulative, and therefore the defendants now rest." (R., 1225.)

TESTIMONY OF PHILIP HORSTMAN, FOR COMPLAINANTS (RECALLED IN REBUTTAL).

PHILIP HORSTMAN was called in rebuttal by the complainants, and testified that he occupied the position of Transit manager with the Northwestern National Bank; that he started in 1923 and had been with them four years; that the transit department sent out all Cash Items drawn on points outside of Portland, to be specific, to banks in Titusville, Brookville, Tionesta, and Crawford Trust Company and such like, in Pennsylvania; that the records were kept with respect to such transactions in the transit department, and they would put down a list of all the items, when they were sent out, and when they came back they made a record of whatever might have been returned and sent them down to the collection department, with what was called "trades," witness would list the total items on the face of these trades and keep one and the other was sent to the collection department along with the items themselves. That he would have the item in his department, a charge against the collection department of what was returned, and they would have the same thing there to offset their items; in other words, the items that they carried as Cash would be represented by checks the transit department returned to them; so in such transactions there were two things: first, a record of the

(Testimony of Phillip Horstman.)

checks that went out and second, a record of the checks that came back.

That witness first learned that checks of Wheeler or any of his allied *institutions coming* back, [612—258] about the spring of 1926, and that he informed Olmstead and Bates, and later, possibly about the middle of the year, he noticed that it got larger and followed the same procedure, calling the matter to the attention of Mr. Olmstead and Mr. Bates. That Fraley and the members of his department checked the records right as they found them, and got the same information he had, as they checked the various activities of the institution. That witness made up the first list of Wheeler's overdrafts in the summer of 1926, couldn't fix the exact date, but testified that he furnished such lists frequently from time to time; did not remember how many he furnished in the first part of the year, but in the latter part say from July and August on, he would furnish perhaps one a week. That the Wheeler checks were all handled as regular transit items.

United States of America,
State and District of Oregon,

And, now, at this time after due service of notice to all other parties and compliance by appellant with equity rules 75, et seq., this statement is hereby considered true, complete, and properly prepared and is hereby allowed, settled and approved as all the evidence in said cause upon appeal and

shall be together with exhibits received at the trial certified and transmitted by the Clerk of this court to the Appellate Court at San Fraincisco, California, as that part of the record on said appeal.

Given and done in open court this 13th day of May, 1929.

R. S. BEAN,
District Judge.

Filed May 13, 1929. [613—259]

AND AFTERWARDS, to wit, on the 10th day of October, 1928, there was duly filed in said court, a petition for appeal with order thereon allowing appeal, in words and figures as follows, to wit: [308]

[Title of Court and Cause—Causes Nos. E.–8936, E.–8939.]

PETITION FOR APPEAL AND ORDER ALLOWING SAME.

Filed October 10th, 1928.

To the Honorable ROBERT SHARP BEAN, One of the Junior Judges of the Above-entitled Court, Presiding Therein:

The above-named complainants in the above-entitled causes conceiving themselves aggrieved by [309] the order and decree made and entered by the above-named court in the above-entitled causes on the 11th day of July, 1928, wherein and whereby among other things it was and is OR-

DERED, ADJUDGED and DECREED that complainants failed to establish the allegations of their bills of complaint and that said bills were without equity and that they were not entitled to relief as to any of the defendants and the bills of complaint and causes of suit be dismissed; said causes being tried together upon the part of both complainants, do hereby respectively appeal to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, from said order and decree of July 11, 1928, for the reasons set forth in the accompanying assignment of errors which is filed herewith; and they pray that this their petition for their said respective appeals be allowed and that transcript of record in said causes with the proceedings and papers upon which said order was made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco.

Dated this 10th day of October, 1928.

WILLIAM C. BRISTOL.

WILLIAM C. BRISTOL,

Attorney and Solicitor for Complainants.

ORDER ALLOWING SAID APPEAL.

The foregoing petition for appeal is hereby granted and allowed, and the amount of the [310] bond on said appeal is fixed at $500.00, to be approved by this Court.

Done in open court this 10th day of October, 1928.

JOHN H. McNARY.

JOHN H. McNARY,

District Judge and One of the Judges of Said United States District Court, Presiding Therein.

Filed October 10, 1928. [311]

AND AFTERWARDS, to wit, on the 10th day of October, 1928, there was duly filed in said court, an assignment of errors, in words and figures as follows, to wit: [312]

[Title of Court and Cause—Causes Nos. E.–8936, E.–8939.]

ASSIGNMENT OF ERRORS ACCOMPANYING PETITION FOR APPEAL.

Filed October 10th, 1928.

Come now complainants and file the following assignments of errors upon which they and each of them will rely upon said appeal from the decree made by this Honorable Court on the 11th day of July, 1928, [313] in the above-entitled causes, that is to say, the said District Court for the District of Oregon, in and for the Ninth Judicial Circuit, In Equity, which entered the decree of dismissal of complainants bills in said cause erred as follows:

First. In deciding and holding that the complainants failed to establish the allegations of their bills of complaint.

Second. In holding and deciding that the bills of complaint are without equity.

Third. In holding and deciding that the complainants are not entitled to any relief against the defendants, and in holding and deciding that the bills of complaint and causes of suit as to said defendants should be and was dismissed, and in allowing defendants costs in that particular.

Fourth. In failing to hold, in conformity to the evidence and proof in said causes and upon the theory of complainants bills, that the defendants were liable to the complainants as trustees.

Fifth. In failing and refusing to consider the evidence produced by the complainants in support [314] of their said bills showing and tending to show that the defendants had mismanaged and not conducted the property, business and assets of The Northwestern National Bank in the interest of the stockholders of said Bank.

Sixth. In failing and refusing to apply the evidence, uncontradicted and not refuted by other evidence, that large amounts were withdrawn from the Bank under facts and circumstances disclosed by the evidence, which it was the duty of the directors to prevent; and the Court erred in holding and deciding that they had no reason or suspicion to know that such transactions were being handled in the Bank until February, 1927, the evidence being entirely to the contrary.

Seventh. That the Court erred in not holding and deciding that the critical condition in which it found said Bank actually did get was not due

to the mismanagement of said directors under the evidence.

Eighth. In failing and refusing to decide in accordance with the evidence that the transactions indulged in by the directors, as the evidence showed, subjected the stockholders not only to contingent liability as such but also to an additional liabilty to the undertaking Banks without the consent of said stockholders. [315]

Ninth. In holding and deciding, contrary to the submitted theory of both complainants, that directors are trustees of the stockholders and charged with an absolute duty of performance of their trust, that if their judgment and discretion results in disaster through their acts nevertheless they are not liable for the resulting injury, and in decreeing and deciding that the complainants had no relief whatever.

WHEREFORE the said complainants pray that the judgment and decree and order of said District Court be reversed and that such direction be given that full force and efficiency may inure to the complainants by reason of the allegations of their said bills for all the stockholders of said Bank.

WILLIAM C. BRISTOL.

WILLIAM C. BRISTOL,

Attorney and Solicitor for Petitioners on Said Appeal.

Filed October 10, 1928. [316]

AND AFTERWARDS, to wit, on the 10th day of October, 1928, there was duly filed in said court, a bond on appeal, in words and figures as follows, to wit: [317]

[Title of Court and Cause—Causes Nos. E.–8936, E.–8939.]

BOND ON APPEAL.

Filed October 10th, 1928.

United States of America,
State and District of Oregon,—ss.

KNOW ALL MEN BY THESE PRESENTS that we, Charles A. Burckhardt and Fred A. Ballin, complainants [318] as above set forth in said respective causes, as principals, and the American Surety Company of New York, as surety, are held and firmly bound to and unto the defendants respondents above named in the full and just sum of 500/00, to be paid thereunto, or to their attorneys, successors, representatives, administrators or assigns, to which payment well and truly to be made we bind ourselves and our heirs, executors, administrators, successors and assigns, jointly and severally but firmly by these presents.

SEALED with our seals and dated this 10th day of October, 1928, at Portland, Oregon.

WHEREAS lately at a session of the District Court of the United States in and for the Ninth Judicial Circuit, in causes E.–8936 and E.–8939, being suits heard together and pending in said

court as above entitled, a decree was rendered July 11, 1928, dismissing the bills of complaint and decreeing and adjudging for the defendants, and the complainants having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said decree in the aforesaid suits and a citation directed to the aforesaid defendants issued or about to be issued requiring and admonishing them each to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco on a day certain. [319]

Now the condition of the above obligation is such that if the said Charles A. Burckhardt and Fred A. Ballin shall prosecute their said appeals to effect and shall answer all damages and costs that may be awarded against them if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force, virtue and effect.

CHARLES A. BURCKHARDT.
By W. C. BRISTOL,
His Attorney and Solicitor,
FRED A. BALLIN.
By W. C. BRISTOL,
His Attorney and Solicitor,
(As Principals.)
AMERICAN SURETY COMPANY OF NEW YORK.
[Seal of the American Surety Company.]
By W. J. LYONS,
Resident Vice-President.

Attest. M. RITCHEY,
Resident Asst.-Secretary.
(As Surety.) [320]

ORDER ON BOND.

This bond being presented to me, the undersigned District Judge presiding at said trial, for approval of the sufficiency of the surety, and it being considered that The American Surety Company of New York is a surety company authorized in this District to and does give bonds in such causes, the said bond is hereby approved in accordance with the amount heretofore affixed by this Court this 10th day of October, 1928.

JOHN H. McNARY.
JOHN H. McNARY,
District Judge.

Filed October 10, 1928. [321]

AND AFTERWARDS, to wit, on the 26th day of March, 1929, there was duly filed in said court, a praecipe for transcript, in words and figures as follows, to wit: [322]

[Title of Court and Cause—Causes Nos. E.–8936, E.–8939.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To G. H. MARSH, Clerk of the Above-entitled Court, Postoffice Building, Portland, Oregon.

You will please make up the transcript on appeal

in the above causes including therein the following papers, copies of which in each instance I furnish you numbered 1 onward consecutively as per the items below.

(1) Burckhardt complaint #E.–8936, copy of which is herewith furnished you.

(2) Motion of Chauncey McCormick with affidavit attached (the cover part need not be included. [323]

(3) Order signed by Judge Bean, December 27, 1927, on the McCormick motion, copy of which, exclusing cover, furnished herewith.

(4) Answer of defendant Phil Metschan.

(5) Answer of defendant Charles K. Spaulding.

(6) Answer of defendants,—Bank, Charlton, Collins, McCormick, McDougall, Pittock, Skinner, Stewart, Price and Twohy.

(7) Answer of Emery Olmstead.

(8) Answer of Charles A. Morden.

(9) Complaint in cause #8939 as filed by Ballin.

(10) Decree of July 11, 1928, signed by Judge Bean.

(11) Petition for appeal and the allowance of the same.

(12) Bond on appeal.

(13) Citation.

(14) Statement of the evidence, to be settled, approved and allowed in accordance with Rule 75, the original of which statement is now herewith lodged with you and a copy of

which has been served upon counsel for the defendant respondents.

(15) Along with this I am appending a notice of the filing and to note a hearing ten days hence for the allowance of statement, service of which has been duly made.

(16) A copy of this praecipe as served upon counsel and as attached to said statement.

Very respectfully yours,

W. C. BRISTOL,

Attorney for Complainants in the Lower Court and for the Appellants.

Filed March 26, 1929. [324]

AND AFTERWARDS, to wit, on the 5th day of June, 1929, there was duly filed in said court, a counter-praecipe for transcript of record on appeal, in words and figures as follows, to wit: [325]

[Title of Court and Cause—Causes Nos. E.–8936, E.–8939.]

COUNTER PRAECIPE FOR TRANSCRIPT ON APPEAL.

To G. H. MARSH, Clerk of the Above-entitled Court, Postoffice Building, Portland, Oregon.

You have heretofore been requested by Mr. W. C. Bristol, attorney for the complainants in the above-entitled case, to make up the transcript on appeal in the above causes and to include therein certain

papers. We hereby request and direct you that in making up said transcript on appeal you include therein the following papers not included in the list furnished you by Mr. W. C. Bristol, attorney for [326] the complainants:

1. Answer of defendant Phil Metschan in the Ballin case.
2. Answer of defendant Charles K. Spaulding in the Ballin case.
3. Answer of defendants, Northwestern National Bank, Charlton, Collins, McCormick, McDougall, Pittock, Skinner, Stewart, Price and Twohy in the Ballin case.
4. Answer of defendant Emery Olmstead in the Ballin case.
5. Answer of defendant Morden in the Ballin case.
6. Decree in Burkhardt case.
7. Memorandum decision of Judge Bean on motion to quash service on defendant McCormick.
8. Petition for appeal in Ballin case.
9. Bond on appeal in Ballin case.

Very respectfully yours,

CHARLES A. HART,
CAREY & KERR,

Attorneys for Defendants, Northwestern National Bank, Charlton, Collins, McCormick, McDougall, Pittock, Skinner, Stewart, Price and Twohy.

ALFRED A. HAMPSON,
DEY, HAMPSON & NELSON,
Attorneys for Defendant Phil Metschan.

ROBERT F. MAGUIRE,
WINTER & MAGUIRE,
Attorneys for Defendant Charles K. Spaulding.
JOHN F. LOGAN,
Attorney for Defendant Charles A. Morden.
[327]

District of Oregon,
County of Multnomah,—ss.

Due service of the within praecipe for transcript on appeal is hereby accepted in Multnomah County, Oregon, this fourth day of June, 1929, by receiving a copy thereof, duly certified to as such by C. A. Hart, of attorneys for respondents over objection not filed within time.

W. C. BRISTOL,
Attorney for Complainant.

Complainants refuse an unqualified acceptance hereof for the portions now requested are not within province or time of the rule.

W. C. BRISTOL,
Attorney for Complainant.

June 4/29.
Filed June 5, 1929. [328]

AND AFTERWARDS, to wit, on Monday, the 17th day of June, 1929, the same being the 81st judicial day of the regular March term of said court—Present: the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [614]

[Title of Court and Cause—Causes Nos. E.-8936, E.-8939.]

ORDER DIRECTING TRANSMISSION OF EXHIBITS.

It appearing to the Court that G. H. Marsh, Clerk hereof, has about completed the transcript upon appeal in these causes and *and* that it would be proper, as heretofore considered by the Court, for the United States Circuit Court of Appeals to have before it for consideration and inspection the original exhibits in these causes, it is now therefore

CONSIDERED, ORDERED AND ADJUDGED that G. H. Marsh, Clerk, be directed in connection with this order to transmit as part of said transcript now prepared to Paul P. O'Brien, Clerk of the United States Circuit Court of Appeals, in and for the Ninth Circuit, at San Francisco, the original exhibits in these causes as introduced upon trial for the consideration and inspection of said Court upon the appeal pending therein.

Dated this 17 day of June, 1929.

R. S. BEAN,
District Judge.

Filed June 17, 1929. [615]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 3 to 615 inclusive, constitute the transcript of record upon the appeal in a cause in said court, in which Charles A. Burckhardt is plaintiff and appellant, and The Northwestern National Bank, Charles K. Spaulding, Phil Metschan, A. D. Charlton, E. S. Collins, Chauncey McCormick, Natt McDougall, Frederick F. Pittock, Mark Skinner, Charles H. Stewart, O. L. Price, Emery Olmstead, James F. Twohy and Charles A. Morden, are defendants and appellees, and another cause in said court in which Fred A. Ballin is plaintiff and appellant, and The Northwestern National Bank, Charles K. Spaulding, Phil Metschan, A. D. Charlton, E. S. Collins, Chauncey McCormick, Natt McDougall, Frederick F. Pittock, Mark Skinner, Charles H. Stewart, O. L. Price, Emery Olmstead, James F. Twohy and Charles A. Morden, are defendants and appellees; that the said transcript has been prepared by me in accordance with the praecipes for transcript filed by said appellant and said appellees and is a full, true and complete transcript of the record and proceedings had in said court in said cause, as the same ap-

pear of record and on file at my office and in my custody, in accordance with the said praecipes.

I further certify that the cost of the foregoing transcript required by the praecipe of said appellant is $126.30, and that the same has been paid by the said appellant, and that the cost of the transcript required by the praecipe of the appellees is $18., and that the same has been paid by the said appellees.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this June 28, 1929.

[Seal] G. H. MARSH,
Clerk. [616]

[Title of Court—Causes Nos. E.–8936, E.–8939.]

CITATION ON APPEAL (CHARLES A. BURCKHARDT).

To the Northwestern National Bank, Charles K. Spaulding, Phil Metschan, A. D. Charlton, E. S. Collins, Chauncey McCormick, Natt McDougall, Frederick F. Pittock, Mark Skinner, Charles H. Stewart, O. L. Price, Emery Olmstead, Jas. F. Twohy and Charles A. Morden, and Their Respective Attorneys & Solicitors. GREETING:

WHEREAS, Charles A. Burckhardt in cause E.–8936 and Fred A. Ballin in cause E.–8939 both relating to the same subject matter and tried as one

cause lately in said court now have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

YOU ARE THEREFORE HEREBY CITED AND ADMONISHED to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand, at Portland, in said District, this tenth day of October, in the year of our Lord, one thousand nine hundred and twenty-eight.

JOHN H. McNARY,
District Judge.

[Seal] Attest: G. H. MARSH,
Clerk.

United States of America,
District and State of Oregon,—ss.

Service of the within citation on appeal is hereby acknowledged by receiving copy thereof this 10th day of October, 1928, at Portland, Oregon.

CAREY & KERR,
CHARLES A. HART,
CHARLES E. McCULLOCH,
Attorneys for the Bank and all Other Defendants Save Those Otherwise Represented.

WINTER & MAGUIRE,
Attorneys for Charles K. Spaulding.

DEY, HAMPSON & NELSON,
Attorneys for Phil Metschan.

CAREY & KERR,
CHARLES A. HART,
CHARLES E. McCULLOCH,
M. A. ZOLLINGER,
Attorneys for E. S. Collins.

JOHN F. LOGAN,
Attorney for Charles A. Morden.

[Endorsed]: Filed Oct. 10, 1928. [1]

[Title of Court—Causes Nos. E.–8936, E.–8939.]

CITATION ON APPEAL (FRED A. BALLIN).

To the Northwestern National Bank, Charles K. Spaulding, Phil Metschan, A. D. Charlton, E. S. Collins, Chauncey McCormick, Natt McDougall, Frederick F. Pittock, Mark Skinner, Charles H. Stewart, O. L. Price, Emery Olmstead, James F. Twohy and Charles A. Morden, and Their Respective Attorneys & Solicitors, GREETING:

WHEREAS, Charles A. Burckhardt in cause E.–8936 and Fred A. Ballin, in cause E.–8939 both relating to the same subject matter and tried as one cause lately in said court now have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and have given the security required by law;

YOU ARE THEREFORE HEREBY CITED AND ADMONISHED to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand, at Portland, in said District, this tenth day of October, in the year of our Lord one thousand nine hundred and twenty-eight.

JOHN H. McNARY,
District Judge.

[Seal] Attest: G. H. MARSH,
Clerk.

United States of America,
District and State of Oregon,—ss.

Service of the within citation on appeal is hereby acknowledged by receiving copy thereof this 10th day of October, 1928, at Portland, Oregon.

CAREY & KERR,
CHARLES A. HART,
CHARLES E. McCULLOCH,
Attorneys for the Bank and all Other Defendants Save Those Otherwise Represented.

WINTER & MAGUIRE,
Attorneys for Charles K. Spaulding.

DEY, HAMPSON & NELSON,
Attorneys for Phil Metschan.

CAREY & KERR,
CHARLES A. HART,
CHARLES E. McCULLOCH,
M. A. ZOLLINGER,
Attorneys for E. S. Collins.

JOHN F. LOGAN,
Attorneys for Charles A. Morden.

[Endorsed]: Filed Oct. 10, 1928. [2]

[Endorsed]: No. 5874. United States Circuit Court of Appeals for the Ninth Circuit. Charles A. Burckhardt, Appellant vs. The Northwestern National Bank, a National Banking Association, Charles K. Spaulding, Phil Metschan, A. D. Charlton, E. S. Collins, Chauncey McCormick, Natt McDougall, Frederick F. Pittock, Mark Skinner, Charles H. Stewart, O. L. Price, Emery Olmstead, James F. Twohy and Charles A. Morden, Appellees, and Fred A. Ballin, Appellant, vs. The Northwestern National Bank, a National Banking Association, Charles K. Spaulding, Phil Metschan, A. D. Charlton, E. S. Collins, Chauncey McCormick, Natt McDougall, Frederick F. Pittock, Mark Skinner, Charles H. Stewart, O. L. Price, Emery Olmstead, James F. Twohy and Charles A. Morden, Appellees. Transcript of Record. Upon Appeals from the United States District Court for the District of Oregon.

Filed July 2, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5874

IN THE

United States Circuit Court of Appeals

IN AND FOR THE NINTH JUDICIAL CIRCUIT
IN EQUITY

CHARLES A. BURCKHARDT,
vs.
NORTHWESTERN NATIONAL BANK, et. al.,
Respondents.

FRED A. BALLIN,
Appellant,
vs.
THE NORTHWESTERN NATIONAL BANK, et. el.,
Respondents.

Brief of Appellants

MESSRS. SHEPPARD, PHILLIPS & RALSTON, MESSRS. CAREY & KERR, MR. C. A. HART, MR. JOHN F. LOGAN, MESSRS. WINTER & MAGUIRE, MESSRS. DEY, HAMPSON & NELSON, MR. M. A. ZOLLINGER, All of Portland, Oregon,

Attorneys for Respondents.
Appellant,

W. C. BRISTOL,
Wilcox Bldg., Portland, Oregon.
Attorney for Appellants.

LANE-MILES STANDISH CO.

No. 5874

IN THE

United States Circuit Court of Appeals

IN AND FOR THE NINTH JUDICIAL CIRCUIT
IN EQUITY

CHARLES A. BURCKHARDT,
vs.
NORTHWESTERN NATIONAL BANK, et. al.,
Respondents.

FRED A. BALLIN,
Appellant,
vs.
THE NORTHWESTERN NATIONAL BANK, et. el.,
Respondents.

Brief of Appellants

INDEX TO CASES

INDEX TO CASES—*Continued*

INDEX TO CASES—*Continued*

INDEX TO CASES—*Continued*

INDEX TO SUBJECT MATTER

INDEX TO SUBJECT MATTER—*Continued*

ABSTRACT OF STATEMENT OF THE CASE

(Rule 24 (a))

Because of the acts, conduct and things the respondents did do, and failed, neglected or refused to do, in consequence of which in the affairs and transactions intrusted to them, the institution hereinafter mentioned was put out of business, Burckhardt and Ballin were respectively complainants in the District Court in and for the District of Oregon, by their respective bills of complaint upon the part of all stockholders in equity to invoke the trust relationship that exists between the corporation and directors on the one part, and the stockholders upon the other in what is alleged and proved to be the mismanagement of the Northwestern National Bank, a national banking association and a member of the Federal Reserve in Portland, Oregon, by the impairment of its capital and surplus and its asset values and to obtain an accounting therefor and for the value of the shares of the respective complainants' stock against notes then claimed to be held by and since paid to and received by the bank.

The duties, arising from the fiduciary obligation asserted in the respective bills of complaint, were not alone based upon the particular means by which or the manner in which the particular things established by the evidence were done or exercised or carried on, but on the fact of the policy of con-

trol, direction and management which the respondents held of the common bank property and in the way they exercised their functions to the destruction of the bank.

The complainants as a basis for the theory upon which they brought these suits asserted it to be a firmly established principle of equity that where one person occupies a relation or position where he owes a duty to another, he shall not place himself in any way to act contrary to that duty, and if he does so act *a court of equity will not inquire whether he had in fact violated his duty but will grant relief irrespective of good or bad faith or intention if the other party to the relationship or position desires it; and these cases are predicated upon this equitable principle.*

The theory was constantly presented to the trial court that the banking corporation itself was a trustee for stockholders, that its directors themselves were trustees for the stockholders and that the minority rights could not be prejudiced by the action of the majority in the way they piled up losses as directors of said bank resulting in its destruction as a going concern.

It is believed and was at the trial asserted and is here again asserted that the trial court failed to recognize this theory of the complainants and staunchly adhered to a theory entirely different,

apparently requiring that the complainants should show some dishonesty or criminal purpose in terms of the Banking Act *quite aside from the common law liability of the director or his trust relation to the stockholder;* and the trial court seemed to disregard the entire theory made by the bills of complaint and as presented by the evidence, to-wit: that the directors of a bank, as the evidence showed, replete with assets and of high standing resources running somewhere in the neighborhood of twenty-eight millions, in a short period of time should find itself entirely defunct and a creature for disposition by a majority of the stock of the bank without the consent of all of the stockholders at the time the directors so did and certainly without the consent of these complainants, and also stockholders Cotton and Griffith.

It was also submitted that the minority stockholders were made subject to not only the liability by the Banking Act but to contingent liability created by the acts of these directors and by the mismanagement of the bank's affairs in such way and manner as to entirely ruin the value of their stock and subject them to liabilities without their consent because the creation of these liabilities in such manner did not have the warrant of law.

The court below persistently held that it was not enough to show mismanagement, inattention, or negligence, but that violations with dishonest

purpose must have knowingly been committed, or that directors knowingly permitted someone to violate the law, and that in the absence of any such proof no equitable relief could be had. The trial court seemed to be of the opinion that the theory of complainants was to make the directors guarantors of the fidelity of the employees and that in failing to prove, if there was such failure, which is not conceded, any violation of the criminal side of the Banking Act, there was nothing upon which to base, by equitable doctrine, a liability upon any director to account to the bank or to the complainants or either of them. Hence, this appeal.

It will aid the court to a consideration of the matters involved to have a

SUMMARY OF THE IMPORTANT EVIDENCE

In order to do this direct quotations shall have to be made from the statement of the evidence prepared upon this appeal as the printed record is not yet at hand for reference and cannot be furnished in time within which the rule requires this brief to be prepared.

In March, 1923, L. B. Menefee, then a Director and one of the Examining Committee, together with Jones and Standifer, stockholders, sold some 4,200 shares for $150.00 a share to J. E. Wheeler, and the record discloses that Olmstead, himself, aided Wheeler in securing the necessary financing

for the purchase of this stock to block the sale of the bank which had theretofore been arranged by O. L. Price and the other defendants in this case; in March, 1923.

The record also shows that in 1923 before Sensenich left the bank in June, change in management by eliminating Olmstead was suggested and continued to be a growing suggestion ultimately voiced by the Comptroller, and that the first discussion of a change in management was in the fall of 1922. These things were discussed by Charlton, Metschan, Spalding and Price, and Price discussed it in June, 1926 with the Comptroller, Washington.

The Court discharged Chauncey McCormick, one of the directors, upon the ground that the suits brought *were not of a local nature*, and that as he was a resident of Illinois he could not be sued in the District of Oregon.

O. L. Price became a director April 6, 1914; Nat McDougall, January 11, 1916; Chas. K. Spalding, July 29, 1918; C. A. Morden, January 6, 1919; Mark Skinner, January 9, 1922; Chas. H. Stewart, July 1, 1922; James F. Twohy, August 28, 1922; Frederick F. Pittock, December 1, 1922; E. S. Collins, July 19, 1923. Emery Olmstead and A. D. Charlton were directors from the time the bank was organized in 1912, and Phil Metschan became a director January 13, 1920.

Exhibits 21 to 26, inclusive, exemplified the oaths of office, certified by the Comptroller, of these directors for 1922 to 1927, both inclusive.

O. L. Price became president in stead of Emery Olmstead on March 1st, 1927.

On March 29th, 1927, the institution ceased to conduct its business.

Of the directors above named Olmstead, Price, Charlton, Metschan, Spalding, Pittock and Skinner were substantially the controlling members of the executive committee from 1923 on, meeting every Tuesday. On occasion some one other director or officer acted, like Stewart.

By-laws of this banking association specifically provided that the Board of Directors *and not the President* managed, directed and controlled the conduct of the association.

Under By-laws 6 and 7, Chairman of the Board, O. L. Price, *was the President's superior officer.*

Under By-law 13 the Executive Committee and seven members chosen from and appointed by the Directors as specified were specifically assigned.

> "It shall be the duty of the Executive Committee to keep fully informed in regard to current business of the association and, when the Board is not in session, to superintend the

transaction thereof; to pass upon, supervise, regulate and control lines of credit, investments of funds of the bank, purchases and sales of securities, loans on collateral, discounts, and purchases of bills, notes and other evidences of debt, and purchases and sales of bills of exchange; to fix all salaries and compensations paid or payable by the association, except as otherwise declared in the by-laws or by resolution of the Board of Directors; to fill any vacancy in the Committee by election of a member of the Board of Directors, to be confirmed by the Board at its next meeting, and, in the event of the absence of any member of the Executive Committee, in its discretion to appoint a member of the Board of Directors to fill the place of such absent member, to serve during such absence. The Committee shall meet at least once each week, and a majority of the members of the Committee shall constitute a quorum thereof necessary for the transaction of business. The Committee shall appoint a secretary whose duty it shall be to record the proceedings of the Committee in full in a minute book of the bank, to be kept and provided for such purpose, and the record of such proceedings shall be signed by all members of the Committee participating therein. Such record shall be open at all times to the inspection of any member of the Board of Directors, and all action by the Executive Committee shall be reported to the Board of Directors at its meeting next succeeding such action." (r. pp. 33-34)

These directors were paid under and pursuant to By-law 19 of the bank $10.00 for attendance at regular or special meetings of the Board and $20.00

for attendance at regular or special meetings of the Executive Committee. Under Section 19 of the By-laws as amended, and in force during the times set forth in the bills of complaint, in addition to these compensations Messrs. Charlton and Metschan commencing in the year 1921 were paid separately as members of the Examining Committee, and in addition to their compensation as Directors, $375.00 each, and in the year 1922 $375.00 each, and in the year 1923 $400.00 each, and this was the compensation each year received by Chas. K. Spalding who with Metschan and Charlton became a member of the Examining Committee. These members of the Examining Committee in addition to their pay as Directors in 1924 received $400.00 each, and in 1925 $400.00 each, and in 1926 $600.00 each, etc. And these compensations continued down to and inclusive of the time that the bank closed, and were specially paid for the services referred to in the by-laws. Olmstead, Skinner and Stewart as Directors were officers of the bank and paid regular salaries, amounting to several thousand dollars each per annum. *Not one of the directors involved in these proceedings was a gratuitary bailee or agent; but a paid employee.*

Ballin first became a stockholder July 1, 1918, and paid for 100 shares of stock $125.00 a share. Afterwards and in July, 1922, when the capital stock was increased Ballin paid for an additional 100 shares, $150.00 a share.

Burckhardt paid for his stock June 25, 1918, 250 shares at $125.00 a share.

Exhibits 53, 56, 56(a) and 57, and Exhibits 58 and 59, make clear the reflection of the increase of stock to the transactions of Burckhardt.

Substantially, the standard form which the Examining Committee of this bank used and employed during the whole period of time involved in this proceeding, after stating the dates that the examination may have covered, read as follows:

> "We counted the cash; examined bonds and other securities; we very carefully checked the notes, collateral and real estate. We checked the outstanding and certified checks, cashier's checks, time and demand certificates of deposit and overdrafts; we verified the outstanding stock certificates; verified the first clearings; examined the expense account and general affairs of the bank, making a full and complete examination of same.
>
> "We found the books correct; that the bank is in good condition and that the value at which the assets are carried on the books is fully justified.
>
> Respectfully yours,
> (Signed) Geo. H. Kelly,
> A. D. Charlton,
> C. A. Morden."

except that when the Examining Committee changed, the names signed were different. Latterly, Charlton, Metschan and Spalding.

In July, 1922, the bank increased its capital stock from $1,000,000.00 to $2,000,000.00 and its surplus from $250,000.00 to $400,000.00, and on March 6, 1922 the directors resolved that the increased capital stock of the bank be offered for sale at $150.00 per share, and that the stockholders be given until April 1, 1922 within which to take their proportion, to be paid for in cash on or before June 15, 1922.

It is proper to call attention to the fact that after this increase in capital stock the evidence shows that the Examining Committee on November 21, 1922, called to the attention of the Board of Directors, using the form as above set forth, specific items aggregating many lines in which among other things they recommended reduction and also of expenses of the bank to extent of $40,000.00 per year.

On the 16th day of January, 1923, Price, Olmstead, Charlton, Pittock, Menefee, Skinner and others being present, a letter signed by the Directors present was addressed to the Comptroller of the Currency at Washington, D. C., in which among other things it was stated by these Directors:

> "At a meeting of the board of directors of the Northwestern National Bank of Portland, held on this date with Examiner M. C. Wilde, the general condition of the bank and the

following matters of criticism were fully considered—slow and doubtful assets aggregating $4,426,666.04 and $539,418.44, respectively, and estimated losses, $143,894.36.

Directors are cooperating with the officers, and a united effort is being made to eliminate matters of criticism and improve the general condition of the bank." (r. 48-49)

Following this on the 21st day of June, Directors Metschan, Charlton, Pittock, Stewart, Spalding, Skinner, Price and Olmstead addressed the Comptroller of the Currency a letter, among other things, as follows:

At a meeting held June 21st with Examiner M. C. Wilde careful consideration was given by the undersigned directors of the Northwestern National Bank of Portland, Oregon, to all matters of criticism contained in the Examiner's report of examination of this bank, now under examination.

"Losses aggregating $102,947.77 were charged off during the examination.

"Slow assets aggregating $3,757,066.77, doubtful assets $426,756.25, statutory bad debts $1,020,068.72, other overdue paper $711,396.01 and the Merchants National Bank, liquidating account, totaling $184,699.34 listed undesirable in the report were considered in detail. These matters are having careful attention of officers and directors and efforts will be continued to improve this condition and reduce these amounts.

"Large lines and other loans especially mentioned by the Examiner were called to our attention.

"It is hoped to fill the three existing vacancies in the board of directors within thirty to sixty days."

The Examining Committee of the bank had reported to the Directors their knowledge of these affairs, and on July 28, 1924, the Treasury Department at Washington through Deputy Comptroller, Mr. McIntosh, wrote the Board of Directors of the Northwestern National Bank among other things, as follows:

The report of an examination of your bank, completed July 11, a copy of which should be in your possession, has been received, and shows *a condition not satisfactory to this office.*

Reports of examination of your association since April, 1921, have been carefully reviewed and show that during the intervening time your bank has been subject to continuous criticism because of a constant accumulation of slow and doubtful assets. The following figures will substantiate this statement:

Report of Examination	Slow	Doubtful
April, 1921	$4,932,220	$446,030
Dec., 1921 and Jan., 1922	4,879,618	457,638
June, 1922	3,188,187	474,706
Dec., 1922 and Jan., 1923	4,426,666	539,418
May and June, 1923	4,050,114	618,396
Dec., 1923 and Jan., 1924	4,325,182	596,020
June, 1924 and July, 1924	4,346,073	528,410

This office desires, however, to urge the management to even greater efforts and to impress upon the directors and officers the fact that energetic efforts and vigorous methods sel-

dom fail to accomplish a great deal... It is hoped by the time of the next examination that the collectibility of paper now held will be definitely demonstrated and that its character will have been improved to an extent which will result in a minimum of loss to the bank.

Particular attention is directed to the following lines and it is urged that they be substantially reduced by the time of the next examination:

Dufur Farm and Fruit Co. ..... (All listed as slow, large loss probable unless orchard is disposed of. Deal now pending for disposition.)	$524,746
Bankers Discount Corporation ..... (Shows an increase since last examination and is all listed slow or doubtful. Loss probable.)	770,112
Pacific Grain Co. ..... (All listed slow and loss probable)	441,122
C. S. Hudson, et. al ..... (Large part listed as slow, some doubtful in bad debts.)	244,543
Northwest Fruit Products Company and Phez Company ..... (All listed slow and doubtful.)	192,000
J. E. Wheeler, Interests ..... (All listed slow in current and overdue paper.)	584,500

Note: *These items alleged in the complaints.*

These things were before considered especially by Olmstead, Pittock, Metschan, Pittock and Skinner, in a meeting of August 20, 1924, and September 8th, 1924; but still remained undone.

With a continuance of the situation the Board of Directors on the 23rd of October, 1925, consisting of respondents Stewart, McDougall, Charlton, Metschan, Spalding, Olmstead, Price and Skinner, wrote the Comptroller of the Currency at Washington as follows:

> The undersigned directors of the Northwestern National Bank met October 23, 1925, with Chief National Bank Examiner, Mr. T. E. Harris, and National Bank Examiner, Mr. M. C. Wilde, at which meeting there was discussed and called to our attention the various matters of criticism, and the unfavorably classified assets shown in the recapitulation of the Examiner's report completed as of this date.
>
> The undersigned directors have assured your Examiners that from their own and personal knowledge, or from reports and information furnished them, that are believed responsible and reliable, the value of assets acquired from the Merchants National Bank, now carried on the bank's books at $498,948.04, is in excess of the carrying figures, and of sufficient value to protect the bank against further loss in this account, notwithstanding the statement contained in President Olmstead's letter dated August 1st, 1923, addressed to your Examiner, giving a much lower valuation at that time, and noting the Examiner's statement to the directors that he does not share the Directors' optimistic view concerning the valuation placed on these assets.
>
> In accordance with our agreement with your Examiners, we will continue to apply our profits as earned to retire the balance of the

paper listed as losses in the Examiner's report. Furthermore we have exercised an option for the sale of our banking house, which, if exercised, will yield a profit of over $200,000. When this profit is realized, it will be applied on the Examiner's estimated doubtful paper.

Serious consideration will be given to the suggestion and recommendation of your Examiners that a "corporation be organized among the shareholders of the bank for the purpose of purchasing as much as possible of the non-income producing assets.

Assurance is given that the management and directors of this bank will continue their earnest endeavors to place this bank in a more satisfactory condition, and serious consideration will be given to all suggestions offered by your Examiners, for the welfare and benefit of the bank.

Respectfully
(Signed)
Chas. H. Stewart
Natt McDougall
A. D. Charlton
Phil Metschan
Chas. K. Spalding.
F. F. Pittock
Emery Olmstead
O. L. Price
M. Skinner.
(R. 140-41)

To this on November 17, 1925, the Comptroller of the Currency wrote the Board of Directors among other things, as follows:

It is thought that the condition of the institution is more serious than the directors will

permit themselves to believe. You are requested therefore, to give the matter very thorough consideration and to endeavor to arrange some plan by which the more dangerous assets may be eliminated. If you are unable to do that, such credit information should be obtained as will enable a more accurate appraisal of the assets than examiners apparently have been able to make in the past.

If such an appraisal should disclose that losses existed in sufficient amount to impair capital, an assessment of the stock could be issued by this office for the purpose of correcting the situation.

This was followed by a letter of the 26th of April, 1926, to the Directors from the Comptroller of the Currency:

The report of an examination of your bank, completed by National Bank Examiner M. C. Wilde, on April 6, 1926, has been received and while indicating improvement along some lines, it does not evidence the degree of improvement that was hoped for and which it is thought might have shown had the management proceeded with collections with the energy which a situation such as yours requires.

Assets classed as slow in the current report amount to $3,734,572.44, including the Merchants Liquidating Account of $498,888.65; while doubtful assets of $513,130.02 are reported, exceeding surplus, undivided profits and reserve accounts, when items of $31,661.79 classed as losses, are taken into consideration.

An exhaustive review of past reports at the time of the previous examination forced the

conclusion that the condition of your bank is more serious than the directors and management believe and the current report bears out that conclusion. Unless, therefore, there is a decided change for the better by the time of the next examination in the character of assets classed as slow and doubtful in the last report, it will be necessary to place thereon much lower valuations than have been given in former reports and this, of course, will necessitate a heavy estimate of losses.

It may be that what is needed in your bank, if its affairs are to be rehabilitated to the satisfaction of the examiner and this office, is an entire change in management. It would seem that capable management should have, over a period of years succeeded in relieving the bank's unsatisfactory condition, but your bank has been continuously unsatisfactory since 1920, which indicates conclusively that there is something wrong in the plan of operation. If a change in management is not feasible at this time, the present management should at least be strengthened by some person of energy and ability, who can and will vigorously proceed to realize all that is possible out of the many slow and doubtful loans and other assets that have been in the bank for so many years. Please give this matter your very earnest consideration.

"The examiner reports that deeds and assignments are now being prepared, by which your bank will acquire title to all of the assets taken from the Merchants National Bank in 1915, a large part of which is real estate. It is proposed, then, to organize a holding company with nominal capital, to take over this real estate, as well as "other real estate" owned by the bank and in exchange therefor

give the bank stock in the holding company. This stock is to be carried in the "securities account" or as "other assets."

The plan as proposed is not approved and should not be carried out. It cannot be seen where the bank would benefit at all merely from the exchange of "other real estate" for stock, which will be even less marketable. A holding company does not serve its purpose unless it actually relieves the bank by a cash purchase of assets removed through it.

The necessity for the organization of a holding company, however, with sufficient paid-in capital, to take out of the bank all of the real estate now owned and which it will have title to after the deeds and assignments of that owned by the Merchants National Bank have been completed, cannot be too strongly emphasized, and it is urged that a company be organized in accordance with this plan; also that the elimination through this source of assets other than real estate, which are of questionable character, be arranged.

On June 6, please advise what decision has been reached in this regard and whether you have been successful in selling any of the real estate owned or have prospects for sales.

At the same time state what has been decided in regard to change in management or whether instead you have procured the services of an able collector. Under either circumstance please state what results have been obtained in the way of collection of slow and doubtful loans and realizing on other slow and doubtful assets up to that time.

A report from you as to what has been done to overcome the other criticisms mentioned on

supplemental sheet 11 is also desired and you are requested to attach a copy of your daily statement as of June 6 for comparative purposes, forwarding duplicates of letter and statement to Chief National Bank Examiner T. B. Harris, 1103 Alexander Building, San Francisco, Calif., and National Bank Examiner M. C. Wilde, 238 Central Bldg., Seattle, Wash.

Respectfully,

(Signed) E. W. Stearns,

(r. 129-132) *Deputy Comptroller.*

In response to this communication of the Comptroller's office at a regular meeting of the Board of Directors on the 9th of May, 1926, O. L. Price, Phil Metschan and Emery Olmstead were requested to call upon the Comptroller of the Currency at Washington, and on May 24, 1926, the Board, McDougall, Price, Collins, Charlton, Metschan, Pittock Stewart, Skinner, and Spalding, signed a letter to the Comptroller saying that Price, Chairman; Olmstead, President, and Metschan, Director, would call upon the Comptroller for a personal discussion, to reach Washington, Monday, June 7, 1926.

On the 22nd of October, 1926, T. E. Harris, Chief National Bank Examiner for the 12th Federal Reserve District, wrote Olmstead, President, the results of his examination of the bank at the close of business, September 21, 1926, and submitted schedules and informed Olmstead as President that his officers had not concurred in the classification that he had made, but that the condition

of the institution as he saw it presented was that *"Estimated losses impair your capital in the sum of $237,460.78, the only legal means for the restoration of which is an assessment which would not only cause unfavorable comment but would leave the bank without a surplus fund."*

The Examiner's report at this time showed non-bankable paper more than $200,000.00 *in excess of the capital surplus and undivided profits and in addition doubtful assets and losses amounting to enough to make up* $4,070,000.00, and Examiner recommended that it was entirely inadequate to do otherwise than to remove all possible losses and doubtful assets so that *the bank might take its proper place among metropolitan institutions.*

Following this, December 2, 1926, the Comptroller, himself, wrote the Board of Directors referring to the Harris report of September 21st, 1926, and which was completed on October 22, 1926 in which he called attention to the impairment of capital and expressed a doubt as to whether the sum of $1,000,000.00 would be sufficient to remove objectionable assets and it was requested that a special meeting be called to give the Examiner's report consideration, saying that they desired to cooperate with the Board to as great an extent as was consistent with its responsibility and would in the meantime withhold issuance of a formal impairment notice pending receipt of ad-

vices regarding the plans for meeting the situation. Particular attention is called to this letter of the Comptroller written December 2, 1926, in view of the testimony of the defense.

Between the 18th day of May, 1926, and throughout the year 1926 the minutes of the Board of Directors did not show that the Board considered the Examining Committee's report, and there was no report considered by any of the Board of Directors at any of the Board meetings until February 16, 1927 for the year 1926.

On December 11, 1926, the Board of Directors held a special meeting about the Harris report of September 21, 1926, and Harris himself was present, and the following proceedings were had:

> "At a special meeting of the Board of Directors of The Northwestern National Bank of Portland, held this date, there were present Messrs. O. L. Price, Emery Olmstead, A. D. Charlton, Phil Metschan, C. K. Spalding, F. F. Pittock, R. S. Collins, Natt McDougall, Chas. H. Stewart and M. Skinner, Mr. Price presiding.
>
> *Mr. T. E. Harris, Chief National Bank Examiner of the Twelfth Federal Reserve District, attended the meeting and discussed with the members of the Board his recent examination of the affairs of the bank. The various items listed for comment and criticism in the Examiner's letter of October 22nd were given special attention, and the suggestion that a company be organized for the purpose of re-*

moving from the bank certain slow and criticized assets, was approved by the Board substantially as outlined in said letter.

There being no further business to come before the meeting it then adjourned.

(Signed) O. L. Price,
Chairman."

Skinner identified and read into the record report of Examiner Wilde of March 25, 1926 with respect to the large lines the complete history of which was shown by this report as identified by the witness, as follows:

"J. E. Wheeler, direct loans	$236,000.00
J. E. Wheeler (sundry drafts in bills in transit) discounted	99,100.00
McCormick Lumber Company (protested checks in cash items)	36,503.50
Wheeler-Olmstead Company (protested checks in cash items)	11,000.00
Wheeler Timber Company	97,500.00
W. E. Wheeler Estate	95,500.00
Telegram Publishing Company	120,000.00
Overdraft	261.78
L. R. Wheeler	106,500.00
	$802,365.28

Loans to J. E. Wheeler unchanged since previous examination, again classified as slow.

Sundry drafts in transit, discounted by J. E. Wheeler, are drawn by J. E. Wheeler on W. M. Wheeler, of San Francisco, the Wheeler Timber Company of San Francisco, and William Smearbaugh, of Pennsylvania, while not classified in this report, *are carried in an ac-*

count "Bills in Transit" and should be carried in Loans and Discounts. One draft for $21,000 drawn on W. M. Wheeler is a renewal.

The McCormick Lumber Company protested checks and the Wheeler-Olmstead Company protested checks, *both carried as cash items,* were eliminated during the examination, having been taken up *by J. E. Wheeler and the McCormick Lumber Company. The original checks were payable to and credited to the account of J. E. Wheeler, and at this examination classed as an excess loan, with the direct liability of J. E. Wheeler.* (See Excess Loan Schedule.)

Loans to the Wheeler Timber Company, the W. E. Wheeler Estate, and the Telegram Publishing Company, all secured with a guaranty of J. E. Wheeler, are unchanged since the previous examination, and all classified slow in this report.

Loans to L. R. Wheeler, who also guaranteed the loan to the Telegram Publishing Company, are unchanged since the previous examination, and again classified slow.

The only change in the entire line since the previous examination is the elimination of the McCormick Lumber Company's indebtedness of $86,500, which was paid through proceeds of a bond issue, *and the addition to the line of the discounts and cash items listed above.*

At the previous examination J. E. Wheeler made an assignment to the Portland Trust Company, as trustee, of his one-eighth interest in timber lands situated in Tillamook county, and one-sixteenth interest in timber lands situated in Yamhill county; also the following stock to secure his entire direct and indirect indebtedness to this bank.

88 shares of Silver Fork Lumber Company.
40 Shares of W. H. Peters Logging Company.
43 Shares of McCormick Lumber Company.
255 Shares of Browns-Wheeler Company.
380 Shares of W. E. Wheeler Company.

This collateral was also pledged as a secondary lien to an indebtedness owing a bank in San Francisco, where it is said the agreement had been forwarded but not returned. President Olmstead gives assurance that Wheeler has arranged his affairs so that a material reduction will be obtained on this line within the near future, either through sale of some of Wheeler's holdings, or a bond issue against the same." (r. 302-304)

That this report also referred to the David Michellvi Sheep Company, and the witness showed that there was listed on that account $350,212.06, including overdraft and investment in stocks and bonds in behalf of the bank, and that as of March 25, 1926, with respect to Dufur Fruit & Farm Company $295,565.68.

Thereupon the witness produced the report of the Bank Examiner T. E. Harris of September 21, 1926, and therefrom informed the Court that the total amount of assets scheduled for examination and *considered non-bankable was* $2,621,240.05, and that the amount then doubtful was $490,468.74; that the amount of slow was $809,747.25; and the witness was then asked if this report showed anything about the Michellvi Sheep Company and the Dufur Farm & Orchards, and the witness then read

from the report as made to the Bank and communicated to the directors the following information as then given in evidence:

> "A. September 21, 1926, Item 7: Under 'Criticism.' *Lenient credit policies which have not only resulted in heavy losses but have carried this institution entirely beyond its legitimate field of banking and made it a partner* and in some instances sole owner of other business which it now directly or indirectly operates. I may refer to, (a) Bi-State Invesment Company, $501,985.55; (b) Dufur Farm and Fruit Co., approximately $300,000; (c) Bavin Michellod Sheep & Land Co., $321,150.00; (d) two-thirds interest in Boulder Creek Lumber Company $77,490 (in addition to a small loan); (e) M. L. Jones-Oregon Agricultural Co. lines $244,681.63; (f) Kelly Ranch Line approximately $190,000. *The foregoing items aggregate more than* $1,500,000, *and are investments which your examiner considers as entirely outside the purpose for which banks are chartered.*" (r. 306)

On January 11, 1927, Charles A. Morden placed in nomination Charlton, Collins, McDougall, Chauncey McCormick, Olmstead, Pittock, Price, Skinner, Spalding, Stewart, Twohy and Metschan.

And in view of the evidence of the defense, the Court should notice and be informed that on January 11, 1927, the Comptroller's letter of December 2, 1926 was then read to the Board, and at the same time the official copy of the Harris report of September 21, 1926 was presented to the Directors

according to the official record of the bank, and no action was taken by the Board.

On the 2nd day of March, 1927, the officers and directors of The Northwestern National Bank caused to be published on the first page of the Morning Oregonian and given out a statement by the bank as follows, to-wit:

STATEMENT BY THE BANK

The Northwestern National Bank announces that the Pittock estate has acquired a larger measure of interest and control in the bank corporation.

Associated with the Pittock estate in ownership and operation of the bank are Messrs. E. S. Collins, A. D. Charlton, Chauncey McCormick, Natt McDougall, Phil Metschan, Frederick F. Pittock, O. L. Price, Mark Skinner, Charles K. Spaulding, Charles H. Stewart and James F. Twohy, directors, all well known in Portland, and the Northwest as men of affairs.

O. L. Price has been elected president of the bank and will have active charge of its business. It will continue to serve the public as a financial institution of first importance and known responsibility.

On the 5th day of March, 1927, another examination of the bank was made by Chief Examiner Harris. This report of Harris is in the record and is one of the Exhibits, but it suffices to shorten the labors of this court by referring to the letter of the Directors of the 18th of March, 1927,

which they wrote to the Comptroller of the Currency at Washington, as follows:

"March 18, 1927.

Comptroller of the Currency,
Washington, D. C.
Sir:

Following the completion of his examination of this institution as of March 5, 1927, Chief Examiner T. E. Harris has invited our attention to the various matters herein referred to with the request that we write you concerning them:

Losses estimated, $2,446,769.65.

This estimate of losses is in excess of the capital, surplus and profits by $2,859.10, and makes necessary an assessment of 100%. *We are unanimous in the request that you immedately issue formal notice of impairment of capital,* together with the necessary instructions, that we may proceed to collect the assessment if we find that we cannot obtain unanimous consent of shareholders to voluntarily restore the capital.

Losses estimated will be charged off and an account opened "Due from Stockholders on Account of Assessment," which will be charged $2,000,000. In the event a report of condition is called for prior to the collection of the assessment, this item will be shown as "Other Assets" as instructed by your Examiner.

The payment of an assessment of 100% has guaranteed by certain responsible shareholders, a copy of which guarantee is submitted herewith.

This bank has been under criticism from your Department for a number of years and particularly so since the acquisition of the old

Merchants National Bank's assets. It has acquired a volume sufficient to produce a splendid net profit on operations. With the elimination of nearly $2,500,000 of income producing assets its earnings should be materially improved, so that earnings of 15% or more may be confidently expected. *We assure you that the credit policies of this bank henceforth* will be conservative so that earnings may be used for dividend purposes and reflected in individual profits, after eliminating any losses that may possibly develop in assets now owned, though we believe these, if any, will be offset by recoveries.

The assessment destroys our surplus fund of $400,000. With all our past difficulties we have succeeded in maintaining the confidence of the public. It is apparent now that we are losing a few small accounts, chiefly savings accounts. This is a situation that is hard to meet. We do not want to go to the public with a published statement showing no surplus. *We have no fault to find with the classification of assets made by your examiner,* though we do believe that in time we will make substantial recoveries on certain items estimated as losses. We admit all items so classified are non-bankable and should be removed.

It is our desire to put all charged off assets into a corporation, all of the stock of which will be trusteed for the benefit of shareholders of the bank, and have this corporation execute its note to the bank for $400,000, which amount will be put into recoveries and transferred to surplus. Your Examiner has agreed with us to recommend that we be permitted to do this, with your approval, provided the note be made to mature in two years, when it must be eliminated, and, provided further, that each

of the directors will unconditionally guarantee that after applying all recoveries from the assets owned by this corporation, and after applying all undivided profits on hand on the date of the maturity of this note (keeping the $400,000 surplus fund intact) any balance due thereon will be taken up by the directors individually.

Our only objection to this program is the fact that some of our directors are men of large affairs, who sometimes borrow for themselves or use their credit for the benefit of their respective interests, and the liability incurred as above would detract from their financial statements and hamper them in their individual efforts. We will appreciate a counter suggestion from you, as to how this problem may best be solved.

It has been brought to our attention that losses have been estimated on loans classed as excessive, *and the directors have been requested to remove these losses personally.* We are furthermore advised that under a law a director becomes personally liable for such losses upon a suit by any shareholder or a receiver, when the loans were approved or acquiesced in by him and under a proper showing of negligence. *We do not admit any liability in this connection.* While there are excessive loans in the bank there are mitigating circumstances and at least one of the loans *became excessive in direct violation of a resolution* of this board.

Your examiner has informed us that the only legal means for the restoration of capital in a national bank is by way of assessment—the only means he can insist upon He has seriously recommended, however, that we consider the organization of a new institution,

which he assures us can be accomplished in a very short time, to take over the business of this bank. By this method it is pointed out that we may now provide a surplus fund—making an announcement to the public that should inspire confidence, *avoid the comments incident to an assessment* (which must cover a period of some fourth months) *and the advertisement and sale of stock of delinquent shareholders.* We will give this suggestion full consideration, but at present we want to proceed with an assessment on the stock.

Some months ago you suggested that we consider a change in the management. A change recently occurred by the resignation of one of our active officers whom we believe to be the one referred to in your letter.

Respectfully

H. Skinner
E. S. Collins
C. K. Spaulding
Natt McDougall
Chas. H. Stewart
O. L. Price
A. I. Charlton
Phil Metschan
James F. Twohy
F. F. Pittock

(r. 166-169) *Directors.*

On the 29th of March, 1927 at 9:00 o'clock A. M., Price, Collins, Metschan, Spalding, Charlton, Skinner, Stewart, and McDougall present, the Directors held a special meeting. Price presided and Skinner was Secretary. Directors McCormick, Pittock and Twohy were absent from the state, and the draft of contract between the Northwestern Na-

tional Bank on the one part and First National Bank of Portland and United States National Bank of Portland on the other part, providing for the sale of all assets of the Northwestern National Bank was presented to the Board, and Phil Metschan moved and Charlton seconded his motion that the President and Secretary be authorized and directed to execute and deliver this contract, and thereupon Spalding moved and Stewart seconded his resolution, "*That, whereas, various stockholders had made advances to the bank in the aggregate of a million dollars to be held by the bank as a guarantee for the payment of various and sundry obligations owing to said bank which have heretofore been criticised as undesirable assets of said bank, etc.*

WHEREAS by virtue of said advance of said stockholders, the said bank became indebted in the amount above set forth.

NOW, THEREFORE, be it resolved that the officers of said bank be and they are hereby authorized to execute and deliver to MARK SKINNER as Agent representing said stockholders who have made such advances, a non-negotiable promissory note of this bank in said sum of one million dollars, payable upon demand after all liabilities of said bank to its depositors and others than to said stockholders, shall have been paid.

Thereupon a resolution was unanimously adopted by the vote of all the directors present.

Thereupon a resolution was offered by Mr.

Phil Metschan who moved its adoption, which motion was seconded by Mr. Natt McDougall, which resolution is in words and figures as follows, to-wit:

WHEREAS, C. A. Morden and O. L. Price, Trustees of the Estate of Henry L. Pittock, have paid to the Northwestern National Bank of Portland, Oregon, the sum of one million ($1,000,000) dollars.

NOW THEREFORE, be it resolved that the officers of said bank be and they are hereby authorized to execute and deliver to said C. A. Morden and O. L. Price as such Trustees, the non-negotiable promissory note of this bank in the sum of one million ($1.000,000) dollars, payable upon demand after all liabilities of said bank to its depositors and to others than its stockholders, shall have been paid.

Thereupon said resolution was unanimously adopted by the vote of all the directors present.

There being no further business the meeting thereupon adjourned.

(Signed) M. Skinner,
Secretary.

The form of this contract referred to is as follows:

"To First National Bank of Portland, Oregon, and United States National Bank of Portland, Oregon.
Gentlemen:—

The undersigned, The Northwestern National Bank of Portland, Oregon, hereby proposes to sell, assign and convey to you all of its assets of any name and nature in consideration

of your assuming and agreeing to pay all of its liabilities, including liabilities to depositors, but excepting from said agreement to assume and pay two certain notes bearing even date herewith each non-negotiable in form; one for one million dollars ($1,000,000 payable to C. A. Morden and O. L. Price, trustees, and the other for one million ($1,000,000) payable to Mark Skinner, agent, executed by The Northwestern National Bank of Portland; and excepting any liability to any share-holders of said Northwestern National Bank of Portland. It is further understood that you will liquidate and convert into cash all of the assets so sold and transferred which may be necessary to pay those liabilities so assumed by you and the reasonable expenses of such liquidation and shall thereupon re-assign and re-convey to the undersigned all such assets then remaining.

It is especially agreed by C. A. Morden and O. L. Price, trustees, and Mark Skinner, agent, that if said assets so sold and transferred shall be insufficient when liquidated to pay each and all of said liabilities so assumed, said notes and each of them shall be held for naught as to said First National Bank and said United States National Bank, and to evidence this agreement, C. A. Morden and O. L. Price, trustees, and Mark Skinner, agent, hereunto set their signatures as such. Your acceptance of this proposal shall vest in you the title to all such assets and shall bind you to assume and pay the liabilities above assumed but not those especially excepted as aforesaid. The Northwestern National Bank of Portland hereby guarantees to First National Bank and United States National Bank each and every asset so turned over and delivered, which guaranty shall

be prior in right and prior in time to any liability by Northwestern National Bank upon said non-negotiable notes to C. A. Morden and O. L. Price, trustees, and Mark Skinner, agent.

This instrument is executed pursuant to the unanimous vote so authorized, of a majority of the Board of Directors of the Northwestern National Bank, as appears in the records of said Board in its minute book and by the signature of said Directors appended hereto.

Said directors further agree to forthwith call a special meeting of the stockholders of The Northwestern National Bank for the purpose of adopting a resolution or resolutions ratifying the sale aforesaid and this agreement and the passage of any other resolutions germane thereto. Stockholders holding the number of shares of the outstanding capital stock of The Northwestern National Bank of Portland set opposite their respective names, join in the execution hereof as evidence of their approval thereof and append to their signatures the number of shares they respectively own and hold therein, and agree at said special stockholders' meeting to be called for said purpose, to vote affirmatively upon resolutions approving said sale, and this agreement and any other resolutions germane thereto.

Yours very truly,
The Northwestern National Bank of Portland
By O. L. Price,
President.

Corporate Seal
Attest M. Skinner,
Secretary.

The foregoing proposal is hereby accepted:

The United States National
Bank of Portland
By J. C. Ainsworth,
President.

The First National Bank of
Portland
By A. L. Mills,
President.

Dated March 29, 1927."

The notes referred to are as follows:

Portland, Oregon, March 29, 1927.

For value received the Northwestern National Bank of Portland, Oregon, promises to pay to the order of Mark Skinner, Agent, the sum of one million dollars ($1,000,000) with interest at the rate of six per cent per annum from the date hereof, payable on demand, when and only when from the proceeds of the liquidation of the assets of said payer this date transferred to the First National Bank of Portland and the United States National Bank of Portland, all pursuant to contemporaneous guaranty of the payers, said last named banks have realized sufficient to fully liquidate the liabilities of the payer assumed under contract of even date with the payer. In case suit or action is instituted to collect this note or any part thereof, the said corporation promises to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action. In witness whereof the said corporation under authority of resolution of its

Board of Directors has caused this note to be executed by its duly authorized agents.

THE NORTHWESTERN NATIONAL BANK
OF PORTLAND
By O. L. Price,
President.

The other note is similar in form, made to Price & Morden, trustees, for the same amount.

There were no meetings of stockholders of the bank called, there were no notices sent out to accomplish what the Directors did on the 29th of March or to get previous authorization so to do, and the only notices that were sent and the only meetings that were held were those with respect to matters concerning liquidation afterwards held and by notices subsequently sent. The record shows:

Mr. Hampson: We will admit no formally called meeting of the stockholders except as shown by the records.

Mr. Logan: Admit no call.

Mr. Hampson: No formal call for stockholders meeting except as disclosed by the records.

Mr. Bristol: From March 29th.

Mr. Logan: They are all in evidence.

Mr. Bristol: Then I understand that you mean, Mr. Hampson, do I get this precise as between you and Mr. Hart, that both of you stipulate that there was no called deliberate assembly of the stockholders after January 11, 1927, until the meeting that appears in the record of May 3, 1927, is that right?

Mr. Hampson: I can't exactly say were no stockholders meetings. I said that no stockholders meeting was called in the manner provided for by the by-laws except as the record of such stockholders meeting appears in the record book which is already in evidence.

Mr. Bristol: You agree with that Mr. Hart?

Mr. Hart: Yes, I go further; I will say was none between the dates you specify; the record so indicates.

Mr. Bristol: Mr. Hampson, don't say that.

Mr. Hampson: I will go further than that; I have no doubt that the stockholders met and discussed the affairs of the bank but not called as provided by the by-laws to make what would be technically called a stockholders meeting." (941, 945)

The published statements given out by the Bank Directors of the Bank's condition on each successive call from September 15, 1922, down to and inclusive of March 23, 1927, six days before the bank ceased business, March 29, 1927, which statement was published March 28, 1927, in the Oregonian, were offered and received in evidence, up to No. 51, inclusive. These exhibits were offered serially from No. 30 to 51, inclusive.

Exhibit No. 30 was shown the witness, Paul S. Dick, as the published statement of March 23, 1927, purporting to show under oath and exhibiting the $2,521,676.17 composed of the capital, surplus and undivided profits of said bank at that date, and

Dick was asked whether the discovered losses as of March 29, 1927, would wipe out the entire amount and his testimony was that it would take $6,400,000.00 cash to have reinstated the bank's condition at that time.

These exhibits showed in the publication for the call of December 31, 1924, the amount of *capital, surplus, and undivided profits* were given $2,499,-317.81 by authorization of the Directors.

Similarly the published situation of September 28, 1925, was $2,596,730.18;

or December 31, 1925, the amount published was $2,486,913.45;

For the published condition on the call of April 12, 1926, amount given as $2,519,148.29;

For the call of June 30, 1926, it was published as $2,508,362.21;

And the publication for the call of December 31, 1926 carried the amount of $2,452,570.48;

And for the call which was made March 23 and publication referred to as of March 28, 1927 above, the amount was $2,521,676.67.

Fraley who was Auditor and Cashier, made up a statement which is Complainants' Exhibit 31, and upon this exhibit the Court will notice that the capital surplus and undivided profits for the 29th

of March, 1927, is given as $2,430,026.82. The testimony of Mel Young went into these and other figures.

Without argument the Court is asked to note that the published statement as put out and which Fraley testified he took care of, made in the Oregonian on March 28, was $2,521,676.67.

Now we come to the Comptroller's photostatic copies of the statements of assets and liabilities received by him and certified over the signatures of Olmstead, Price and Pittock, sometimes Charlton, Metschan and Pittock; sometimes Olmstead, Price and Charlton, and Stewart, Price and Charlton, consisting of Exhibits numbered consecutively 32 to 49, both inclusive, and being the period of time for the same calls as published statements were made in the Oregonian for similar dates commencing with September 15, 1922 and ending on the 23rd day of March, 1927, which Exhibit 49 was offered in connection with Exhibit 90 already in evidence.

These exhibits disclosed that the return made to the Comptroller on the call for December 31, 1924, was $2,480,198.74, being the capital, surplus and net undivided profits and sworn to by Olmstead, Price and Pittock;

And that for the call for September 28, 1925, it was $2,524,639.95;

And for the call of December 31, 1925, $2,470,-218.16;

And for April 12, 1926, Exhibit 46, $2,437,226.71;

For the call of June 30, 1926, $2,490,202.43;

And for the call of December 31 1926, $2,430,-026.82, Exhibit 48;

And for the closing report of condition of March 23, 1927, Exhibit 49, $2,456,800.66.

It needs but the inspection of these figures to show the differences between what were deliberately sworn to in the returns to the Comptroller against the figures in the published statements on each call; most of which and their source were testified to by MEL YOUNG, the bookkeeper. (St. p. 146.)

These discrepancies between the reports to the Comptroller and published statements at each call of the condition of the bank are vital and remain unaccounted for by any defense or evidence in the record. The amounts are easily computable and run into thousands of dollars as demonstrated by the evidence. For instance, for the year 1924, Nineteen Thousand Odd Dollars, for the year 1925, Eighty-eight Thousand Odd Dollars, for the year 1926, One Hundred Twenty-two Thousand Odd Dollars, and for the year 1927, approximately Sixty-five Thousand Dollars.

Exhibit 31, A. L. FRALEY, shows that with the capital impaired $9,400,000.00 was needed as of March 29, 1927. If the capital was excluded at $2,000,000.00, it still left $7,400,000.00 to be supplied; but we are told by the evidence that on March 1st there was a million put in and afterwards another million provided for, and on top of this a two million contingent liability of the stockholders.

MR. AINSWORTH, PRESIDENT OF THE UNITED STATES NATIONAL BANK, ONE OF THE TAKING OVER BANKS OF PORTLAND, OREGON, TESTIFIED THAT PROPOSITIONS HAD BEEN MADE TO HIM IN 1923 FOR CONTROL OF THE STOCK AT $150.00 PER SHARE, AND THAT ON MARCH 28, 1927, AFTER ALL NIGHT LONG GOING INTO THE BANK'S AFFAIRS WITH A CROWD OF MEN, IT WAS DISCOVERED THAT ALL OF THE CAPITAL SURPLUS AND UNDIVIDED PROFITS WERE SHORT BY ABOUT TWO MILLION OF PAYING THE DEPOSIT LIABILITY, THEN FOUND THAT IT WOULD TAKE ALL OF THE BANK'S CAPITAL SURPLUS AND UNDIVIDED PROFITS AT AN EVEN TWO AND ONE-HALF MILLION, AND A ONE HUNDRED PER CENT ASSESSMENT IN ADDITION, MAKING TWO MILLION MORE, OR FOUR AND ONE-HALF MILLION, AND THAT TO REINSTATE THE CAPITAL SURPLUS AND UNDIVIDED PROFITS WOULD REQUIRE TWO AND ONE-HALF MILLION

MORE, WHICH WOULD TAKE ABOUT SEVEN MILLION DOLLARS. THAT THE MILLION DOLLAR NOTES, TWO OF WHICH WERE INVOLVED IN THE TRANSACTION OF HIS BANK AND THE FIRST NATIONAL BANK AND WERE TREATED AS CASH BECAUSE MR. PRICE DELIVERED THE EQUIVALENT THEREOF IN BONDS, AND THAT HIS BANK AND THE FIRST NATIONAL DID NOT TAKE THE NOTES BUT TOOK THE ACTUAL BONDS.

MR. PAUL S. DICK, one of the officers of the United States National Bank, corroborated Mr. Ainsworth that the first negotiations of sale were in February, 1923, and he was shown the statement, Exhibit 30, and asked whether it contained the figures of the published statement of the bank that he received from O. L. Price. Mr. Dick replied that Price had given them the figures of the report of the National Bank Examiner, Mr. T. E. Harris, under the date of March 5, 1927, and upon suggestion by Mr. Hart, the witness corrected his testimony to say that the Harris report he probably referred to was one of September 21, 1926, but that taking the complainants' Exhibit 30 as indicative of the condition as of March 29, surplus and undivided profits at $2,521,676.17, Mr. Dick stated that the discovered losses would wipe out the entire amount, and that it would have taken $6,400,000.00 cash to have reinstated the bank's condition at that time.

The Court will remember that Exhibit 30 is the published statement made in the Oregonian March 28, 1927, on the call made March 23, 1927.

LONGSHORE, one of the officers of the bank, testified that Mel Young was the general bookkeeper and kept the records of the bank up to the time it closed, and that if anybody wanted to find out the state of the bank finances, that was the record that they would go to and which would tell from day to day the condition the bank was in, and that was always kept. That the overdraft book was left for the convenience of the officers on Mr. Jones' desk. The witness then went with much detail into the manner of examining the bank and said that the practice was to actually come in contact with the physical papers themselves, and that when items were to be traced of one sort or another, they went to the departments to trace them, and it was just as easy for anybody so doing to be able to see what he saw as well as what other officers of the bank saw.

On June 10, 1926, he wrote J. E. Wheeler a letter, as follows:

June 10, 1926.

Mr. J. E. Wheeler,
Care of Telegram Publishing Co.,
City.
Dear Sir:

We acknowledge receipt of personal guarantee given by yourself to this Bank under date

of June 8, 1926, covering loans made by this Bank to the McCormick Lumber Company, up to $240,000.00.

This guarantee is a continuing guarantee and under same we may continue from time to time to make advances to the McCormick Lumber Company up to $240,000.00.

Yours very truly,
A. C. Longshore,
Assistant Vice President.

This witness identified the McCormick Lumber Company account as the Complainant's Exhibit 2 as it was compared with the records of the bank, and the photostat sheets were offered in evidence. The witness then explained that this account showed its opening in March, 1926, and the continuance of the transactions with that account through the bank, and that it was part of the general books of the bank.

THERE WAS NOTHING TO PREVENT ANY OFFCER OR DIRECTOR OF THE BANK DURING THE PERIOD FROM MARCH, 1926, FROM ASCERTAINING AND KNOWING WHEN HOYT, BROWN, BATES AND HIMSELF TALKED ABOUT IT, WITH RESPECT TO THE WHEELER-McCORMICK LUMBER COMPANY "CASH ITEM" CHECKS. *Hoyt had showed him a list of the checks in July and some in August that were returned unpaid.* Mr. Bates had taken the matter up with Mr. Skinner and he had seen Bates a number of times take it up with Olmstead—almost daily. *Anybody in that bank was in the same position for general knowledge as the witness himself was.*

That before the bank closed there were extensive rumors of the sale of the bank. On the street cus-

tomers had spoken to him about it, and the first time he had heard of a sale of the bank was in 1923, the same sale that Mr. Ainsworth had talked about; that his fellow officers had discussed it with him after the first of the year 1927. Also Mr. Bates, Mr. Brown and Mr. Hoyt, and that the rumors of the sale which the witness had heard came before the discovery of the float and before the change of presidents on March 1, 1927, when Price succeeded Olmstead.

The stock deal:—

Exhibit 11 was signed by Ballin and John Twohy and No. 60 was signed by Wheeler, Olmstead, Collins, Burckhardt, Skinner, Stewart, McDougall and J. O. Elrod. The first time that Burckhardt had seen Exhibit 60 it had three signatures on it, Wheeler, Olmstead and Collins, and the witness signed after Collins. When Burckhardt had talked with Skinner, Olmstead and Metschan, that Skinner had told him that there was a movement on by the Pittock Estate to get control of the Bank and sell it to the First National, and that they wanted to prevent that. These Exhibits 11 and 60, were the papers by which each signer agreed not to assign or transfer his stock, unless a majority of those signing should consent to the sale.

Olmstead had taken an option on Ballin's stock as early as March, 1925, and that was the same stock referred to in the letters of 1927, between Olmstead and Ballin, and Burckhardt had been approached by Olmstead to sell his stock for $140.00,

but Pittock had bought some stock from Lindner in the early part of 1927 at $120.00 a share.

DECKER worked in the Collection Department and noticed collections on account of the McCormick Lumber Company that commenced shortly after 1925, coming back every two or three days, and they would be thrown in "Cash Items" and he noticed that they were increasing; that he always referred the items to George Hoyt, the Assistant Manager in the Department, who was his superior officer, and to Mr. Fraley, the Auditor and Cashier of the bank, and upon question by the trial court the witness explained that "Cash Items" are part of the Bank's assets. *The Collection Items do not show on the bank's statement at all, but the "Cash Items" do.* He always showed the returned Cash Items to Mr. Hoyt and he told Olmstead when any items came back; that Fraley or Mr. Bates, or anyone, could go into the Department and make a list of the items; that the McCormick account was held all of the time until the bank was able to get a check to cover what had been charged to Cash Items, and the account was handled this way all of the time as everybody knew it, and that these Cash Items had to be taken in consideration to arrive at the bank's condition all of the time each day, *and there was nothing to prevent any officer or official of the bank acquiring the same knowledge that Decker himself had during the periods of the transactions;* that these items denominated "Cash

Items" as the account was opened in March, there were lots of them; *they were all right on the sheets, complainants Exhibit 2.*

The daily statement of the bank necessarily had to show the total of "Cash Items" at the end of each day's business. When the Examining Committee was looking into the Bank's condition, the Cash Items were listed in the usual way and they were handed to Mr. Fraley that he might go over them with the Examining Committee; that he turned his lists over to the General Bookkeeper, Mel Young, and that Mel Young would make entries on the bank books.

RINGSRED, HOYT, JONES, BATES AND HORSTMAN all practically testified to the same effect, amplifying Longshore's explanation and Fraley's methods of audit, and it thus appeared that as early as July and certainly before August, the attention of the bank officials was called to the large amounts of Cash Items that were moving through the Wheeler and McCormick Lumber Company transactions in this bank. And the bank records showed in connection with the daily statement book prepared by Mel Young and always open to investigation by all of the officers, and by the overdraft book always kept on Jones' desk, and by the list of Cash Items kept in the Collection Department, through Horstman direct, and under the guidance of Hoyt, *that that was the avenue of con-*

stant information as the evidence discloses, showing that as the Examiner had heretofore stated on previous transactions as hereinbefore shown, the accounts called "Sundry Bank," "Cash Items" and "Bills in Transit," progressively grew and increased commencing in May 1926, *and down through and inclusive and up to March* 2, 1927; *that these figures were open and observable to anybody from clerks on through to subordinate and in to superior officers whose particular attentions were called thereto, and that these items ran into an increasing million, being in all* $1,100,000.00, *rising in September to over* $2,000,000.00 *with gradual progression for* 1926, *and in October to over* $2,000,000.00, *and approaching* $2,000,000.00 *in November,* 1926, *when particularly on November* 19, 1926, *under testimony of Fraley, the report of the Examining Committee showed* $1,833,084.84, and in January, 1927, the items had fallen a little but remained on January 17, 1927, at $1,7000,000.00 odd, and on February 16, 1927 Cash Items were approximated $800,000.00 and Sundry Bank Account nearly $1,700,000.00; *and on February* 28 *the Cash Items were* $823,000.00. *On March* 1*st, however, the same Sundry Bank Items had been stated by Mel Young, bookkeeper, to be* $1,242,522.36. *The difference between the amount on March* 1*st, and the amount on March* 2*nd is obviously* $796,762.00 *in the account of Sundry Banks,* which is the amount of the alleged and much talked of kite or float of the Wheeler-Olmstead transaction.

On March 2nd, a Cashier's check was made by the bank to Mark Skinner for $922,100.00, and on March 2, 1927, an entry was made in the Stockholders' Account of $929,600.00, and a credit was given to Price, the president, of $7,500.00, the difference between the entry to the Stockholders' Account and the credit to Price, being $922,100.00, the amount of Cashier's Check held by Mark Skinner.

The knowledge and means of knowledge of these transactions were known to everyone in the bank, and recorded upon its books, and the $922,100.00 Cashier's Check is the amount denominated by O. L. Price in his testimony as the "first mililon."

The evidence shows by Exhibit 2 that the total transactions between March 29, 1926, and March 1, 1927, of McCormick Lumber Company and Wheeler were $13,354,976.03, and the other side of the account shows that there were returns from this vast amount of Items some $12,320,000.00, and the difference would represent approximately what has been paid.

Taking the items in connection with the bank's statement book so specifically described by MEL YOUNG, the bank's bookkeeper, the total withdrawn money and credits in connection with the Complainants' Exhibit 2 would indicate $1,672,-000.00, and the total paid about $876,000.00 leaving $796,762.00 as before in accordance with the entry of March 2nd, as the summated result of the trans-

actions over a period of a year. The basis for these figures appears in the statement of the evidence, page 144, and following.

OLMSTEAD testified that the Pittock Estate practically controlled the bank through Price and Morden, trustees, and that just before he resigned as president, Price was negotiating with the First National Bank for the disposition of the Northwestern National and that some time in 1925, Price and Morden had wanted to sell the Pittock stock for $125.00, and the reason they had written up the property account for the bank building at $490,000.00 was so that they could secure funds to take care of the frozen assets of the bank, that Price had objected to any method for taking the frozen assets out as proposed by Wilde in 1925, AND THAT THE BANK WAS TAKING ON NEW LOANS ALL OF THE TIME IN 1926 and 1927; that many people had said they did not want to stay in a bank when they did not know where the control would go, *and these things were very harmful to the bank;* that Morden's efforts to sell the bank commenced as early as 1923; *that there had not been any Executive Committee or Directors meetings at which to his knowledge there had been any suggestion about selling the bank;* that the bank's affairs were exhibited to the First National and United States National, and the Comptroller's Report of September 21, 1926, as made by Mr. Harris was also disclosed, prior to the time that he, Olm-

stead, left as president. This was done by Price, *and that although Mr. Morden was not a director of the bank* at the time of attempting to force Wheeler to sell the Telegram, *yet as a Pittock trustee and manager of the Pittock Estate in connection with Price he directed the policies of the bank.* Olmstead as president said the Complainants' Exhibit 2 recorded the transactions of McCormick Lumber Company with the bank, and he said that usually both checks went into the account and were credited as well as checks that came in transit and came back unpaid were ultimately carried as Cash Items, and *that any department that carried these items could be seen as indicated, daily and monthly.* The witness then testified about the transactions with the Wheeler business in 1924 in which there were checks and drafts unpaid and that Skinner and Stewart handled the matter along with him, and it was not done any different way in 1926 after it started in March, 1926; **THAT IT WAS IN JULY 1926 THAT HE AS PRESIDENT KNEW FOR THE FIRST TIME THAT CHECKS IN ANY VOLUME WERE COMNG BACK, AND THAT HE THEN CALLED MR. PRICE INTO HIS ROOM AND TOLD HIM ABOUT IT. THAT HE AND PRICE DISCUSSED THE AMOUNT OF THESE CHECKS AND HE TOLD PRICE AS CHAIRMAN OF THE BOARD THAT THE TOTAL AT THAT TIME WAS SOMETHING LIKE $200,000.00 AND THAT HE FIXED THIS TIME IN JULY OR THE FIRST OF AUGUST, AND THAT PRICE AND HIMSELF WERE INFORMED THAT**

WHEELER WAS EXPECTING MONEY FROM OTHER SOURCES; THAT THERE WAS NO TIME WHEN ANY DRECTOR OR OFFICER WHO WANTED TO KNOW THE EXACT AND PRECISE SITUATION OF THE WHEELER RELATIONSHIP WITH THE BANK COULD NOT HAVE ASCERTAINED IT. That the Board of Directors had never discussed a change of management with him, that it had been his duty to go to the Comptroller for four consecuive years, and that when he got back in each instance he told his fellow directors that the Comptroller insisted on a more vigorous policy, but that there had never been a suggestion to him about a change in management. IT WAS NOT UNTIL AFTER THE CLOSING OF THE BANK, MARCH 29TH THAT OLMSTEAD WAS ASKED TO SIGN THE PAPER CONSENTING TO THE GUARANTEE WHICH WAS PERHAPS A WEEK AFTER THE CLOSING OF THE BANK, AND HE SIGNED THE PAPER AT THE REQUEST OF MR. KERR IN THE VAULT ROOM OF THE SECURITY SAVINGS AND TRUST COMPANY.

Exhibits 69 and 70 were introduced in evidence. Exhibit 69 is the Report by T. E. Harris, September 21, 1926, and Exhibit 70 is the report made by T. E. Harris, March 5, 1927.

COLLINS testified that in the year 1923 he paid $140.00 per share then for his Northwestern stock. He paid $137.50 for some of it.

SPAULDING testified that he could not recall any particular instructions given by him to Olmstead about what he should do concerning Wheeler, by the Board or anybody else, after the October 9, 1924 meeting, no more than what that resolution applied to that was put on the minute book at the time of the overdarft in October, 1924. He did not recall any other time, **BUT THAT WHEN THE EXAMINING COMMITTEE MADE ITS EXAMINATIONS EVERY FACILITY WAS PLACED BEFORE IT TO ASCERTAIN THE AFFAIRS AND CONDITION OF THE BANK.**

Both Olmstead and Metschan admitted the letters, and they were received in evidence as written by them respectively to Burckhardt and Ballin concerning their interests and the values of their stock, and what they should do with it and how Olmstead and Metschan each respectively would look after and conserve the interests of the complainants.

FRALEY, the bank cashier and auditor, among other things testified about the procedure of the Eramining Committee in November, 1926, as follows:

> that the Examining Committee, Messrs. Metschan, Charlton and Skinner had started their examination at the close of business November 19, 1926, and he had a statement in his pocket showing what that eramination was to cover; that the witness had written it up as he always

had done and it was usual for him to give that direction every semi-annual examination, and it read as follows:

MR. BRISTOL: Bank Directors' Examination. Assets and liabilities to be examined and statements to be furnished by auditing department. All cash to be audited by auditing department, for the directors, and with their assistance when possible. Bank securities examined and audited from statement of securities as shown by general ledger and security record." Then the words "Other real estate owned" is that your writing?

A. Yes sir.

Q: "Loans and discounts checked and examined from list furnished by note department and from liability ledger sheets themselves. *Cash items examined and checked to general ledger from list furnished by auditing department, along with Cash Recapitulation.*"

Court: You can read it right along; we will assume you read it right.

Q: "Verification letters sent to all C. H."

A: Clearing house banks.

Q: "Return letters given to directors with copy of settling statement. Examination of outstanding cashier checks, certified checks, time C-Ds, Demand C-Ds and Bills in Transit, *checked from lists made up by auditing department.* Expense and interest paid, condensed statement. Assets non-income producing, statement. Loans and discounts on which interest is not paid. Expense book and stock register examined by directors. And then in writing list of overdrafts. That is your writing?

A. My writing. (r. 695, 696)

And the paper that he prepared as auditor as above quoted was for the guidance of the Examining Committee at that time and, according to his suggestion, the Committee was required to go and look into the cash items, and that they did it and they had done so under his suggestion but he was not positive whether they did it November 19, 1926; and that on November 19, 1926, he gave them a list of the cash items, and the same was introduced as complainant's Exhibit 29.

The witness then produced three papers, consisting of two credit memoranda and one debt memorandum dated March 1, 1927, of the Northwestern National Bank and described them as follows:

"Q: The first item is credit stockholders assessment account, March 1, 1927, F. F. Pittock, $17,500; Phil Metschan, $10,000; E. S. Collins $76,000; O. L. Price special $7500; O. L. Price $29,000; Pittock Estate $769,600; Charles K. Spaulding $20,000. And paid and carried out as $929,600. And initialled "F". That is your initial?

A. That is my initial.

Q. And upon that same date, and as part of the same transaction, the next slip was Credit, Profit and Loss account, transferred from Stockholders Assessment. Account to take care of chargeoffs, $929,600, initial debt. Is that right.

A. That is right.

Q. Now then, the corresponding entry, or

the next part of the transaction is shown by debit slip. Is that right?

A. Yes.

Q. As follows: Debit, *Stockholder's assessment account,* March 1, 1927, F. F. Pittock, $17,500; Phil Metschan $10,000; E. S. Collins, $76,000; O. L. Price Special $7500; O. L. Price $29,000; Pittock Estate $769,600; Charles K. Spaulding $20,000.

A. That is right.

Q. Now the next in order.

A. They come in this way.

Q. Then the next in order gives a credit to Profit and Loss March 2, 1927, charge-off 3/1/27, account McCormick Lumber Company and J. E. Wheeler items, should have gone to Other Bonds, Stocks, Securities, etc. $796,762. Opposite that is written "Claims" and initialed "F."

A. That is right.

Q. There seems to be a lead pencil notation on that. What is that?

A. Mr. Skinner's initial.

Q. On March 2, 1927, debit "Other Bonds, Stocks, Securities, etc." McCormick Lumber Company and J. E. Wheeler Cash Items (see over for list) $796,762, Claims Accounts, and some initials.

A. That is right.

Q. Likewise initialed by Mr. Skinner in lead pencil?

A. Same initial, yes.

Q. And on the back of this are written the items that are referred to on the front of it?

A. That is right.

Q. Showing how the total of $796,762 was made up?

A. That is right.

Q. And is that your writing, or somebody else's?

A. My writing." (r. 704, 705)

The witness then read the items referring to the McCormick Lumber Company aggregating $92,-687.00; then the items similarly referring to McCormick Lumber Company in the Forest County National Bank, Tionesta, Pennsylvania $91,000.00, similar checks on Brookville Title & Trust Company, Brookville, Pennsylvania, aggregating $534,-475.00, and similar checks on Titusville Trust Company, Titusville, Pennsylvania, aggregating $75,-000.00.

It is immdeiately observable to the investigator of fact that if these items on these various banks are added together as those compiled by Fraley and handed to the Examining Committee (Complainant's Exhibit 29) they total $793,162.00, a difference of $3,600.00 from the amount $796,762.00 dealt with on the books March 2, 1927, of which the Examining Committee thus had information in November, 1926.

The witness Fraley then further testified by question and answer on this subject as follows:

"Q. The third group that relates to the ones we first read comprises total sum of $929,000, denotes somewhat of a corrective entry, does it not?

A. The first item of $7500 is correcting entry showing refund to Mr. Price for over-payments on stockholders assessment.

Q. And the second one?

A. The second represents the transfer of stockholders payments on that, in Profit and Loss Account, to Cashier's Checks, which was transferred or given to Mr. Skinner, to be held by him as trustee for the stockholders.

Q. The first paper explains, March 21, 1927, debit Profit and Loss Account, O. L. Price, 3/1, over-payment on stockholders assessment recorded to his account $7500, initialed by yourself and Mr. Skinner?

A. That is right.

Q. In connection with that March 2, 1927, debit Profit and Loss Account entry of 3/1/27, stockholders payment to guaranty fund, entered as stockholders assessment in error, held in "CC" meaning Cashier's Checks.

A. That is right.

Q. No. 172137, and so you will understand, Mr. Hart, Cashier's Check is No. 172167.

A. I can explain that.

Less O. L. Price over-payment refund $7500, and then a deduction from $929,600, that I read in. And the first group of papers

should be March 1st, to which this entry refers, showing debit on that slip of $922,100?

A. That is right.

Q. And then you say a Cashier's Check was made out. That is also initialed by you and Mr. Skinner?

A. Yes.

Q. Now the Cashier's Check referred to, that was given to Mr. Skinner, 172167 on March 2, 1927, $922,100 and signed by Mr. Hoyt and Mr. Skinner is still holding it?

A. Yes.

Q. As trustee for whom, you say?

A. For the stockholders who had paid in on this assessment.

Q. And is the subject of that entry?

A. Yes.

Q. And that is the way—your mind is sufficiently directed to this entry so you know what I am talking about—the way that was taken care of, as I asked you this morning?

A. Yes.

Q. And as auditor did you know—and to be certain if you did I will show you the book as of November 19, 1926, *what the amount of Sundry Bank items was on that date*, as shown on the daily statement of the bank.

Q. Did you know of that item?

A. I did.

Q. And at the time it was entered there?

A. Yes.

Q. And at that time it was what, as shown?

A. *The amount was $1,833,084.44.*

Q. And at that time your Cash Items was also shown to you, was it?

A. *It was.*

Q. How much?

A. $20,731.44." (r. 706, 707, 708)

Q. Can you tell me why, with respect to these papers you produced about this entry, that Mr. Skinner had to O. K. them, why he put his initials on them.

A. *Because he authorized me to make the entries.*" (715)

Price on the part of the defendants in salient features of his testimony pertinent to this summation testified among other things:

That the witness is a lawyer and was admitted to practice in 1900; that the first information he had of the total amount of the float transactions was during the criminal trial. He remembered a figure involving something like thirteen millions of dollars, during the period which was in question, but also recalled that there was a considerable amount of these transactions that were redeposited, and a very large amount of returned items, and also some that were paid. Mr. Morden went with him to the Clearing House and was there with him all the time of the first meeting, when he was explaining conditions and endeavoring to get help. That the rapid growth of the bank, the peak of the transactions, noticeably commenced in 1914 and ran up to 1918 or possibly 1919. Witness was

asked if he recalled along about May 25, 1926, before he went to Washington, that the assets objected to ran to an amount of three million and some odd thousand dollars, but stated that he did not recall the amount of assets that were objected to, he knew that in all the reports there were many items that were criticized, and when his attention was called to the Harris report of March 5, 1927, wherein Harris pointed out to him specific losses of $634,500.00, witness answered that the report would show that, but he had forgotten, that it was a considerable amount, but that he didn't remember the amount; that it was very likely, as overdue paper often amounts to considerable where people were getting renewals on it. His attention was then directed to the Harris report and the Wheeler lines outside the float, as far as estimated losses ran, $1,496,000.00 and some odd, and he was asked whether he recalled that amount outside the float of $800,000.00, and he stated that the total estimated losses were approximately two million dollars. The witness was asked if, when Harris got down to the place where he was computing the bank's total condemned assets or total criticized assets, he took a total of practically two and a half millions of money, and he answered "Practically." He was making—he was preparing for this 100% assessment which we requested. ***Witness was asked, "And you recall, don't you at that time, that Harris showed that Capital, Surplus and Undivided Profits, applied against what he computed,***

left the bank insolvent by several thousand dollars?" and he answered that Harris had made that provision.

That the first discussion of change in management was in the fall of 1922, but that was not taken up directly with the board of directors, that he discussed the matter with various members of the Board as to what might possibly be for the best interest of the bank, and this was following the time when some of the loans became slow and they had to cease paying dividends; that it was finally concluded that change in management was not necessary or advisable—that these matters were discussed with Mr. Charlton, Mr. Metschan and Mr. Spalding, he was not certain that he had talked to Spalding, but remembered discussing it with Charlton and Metschan. That in 1923 it came up again, but it was finally determined that Olmstead was the proper man for the place; he didn't recall having discussed it again until the meeting of June, 1926, the time with the Comptroller at Washington. That the loans he spoke of as affected by deflation were renewed from time to time, but continued down to the period of deflation and the Executive Committee thoroughly discussed these matters, and that the high peak in loans adequately secured was about $15,000,000.00. (r. 1060) When his attention was called to the published calls, say commencing in 1922, the witness answered that it must be remembered that

they were at their lowest at that time, because that was the deflation period that he spoke of, that the loans he spoke of were always carried in Loans and Discount, as the statements were made and amounted to the same thing he referred to when he spoke of Notes and Discounts. That all of their profits were charged up to take care of losses determined by the Examiner after they ceased to pay dividends in 1920; that the Executive Committee met every Tuesday and discussed loans and renewals, then passed their conclusions on to the Board, who passed on them, and they were recorded at their regular monthly meetings. The witness was not pleased with the sale of the Menefee and Standifer and Jones stock to Wheeler because he thought that that sale interfered with his negotiations to sell the bank. It did not occur to his mind as to the fact that there was engendered opposition between the element of the presidency of the bank, and the witness representing the Pittock Estate at that time. (1063) That he and Olmstead were always extremely good friends and as far as he knew that friendship still existed, but that his eyes had become entirely opened in the last few months—were apparently not at that time (1923) that he had every confidence in all the officers of the bank; *that he never figured at any time that he had control beyond the Pittock Estate, the Pittock heirs, handled by himself and Mr. Piper*— that that was the only stock he ever attempted to sell, *and didn't want any effort to make any sort of*

combination because he didn't think that was necessary, and he hadn't supposed any was being made against him. That Wheeler had had very extensive transactions with the bank prior to 1923, and that he knew generally the condition of affairs, that they were discussed often; that Olmstead had told him where Wheeler got the money to pay for the stock, at the same time that he told him of the purchase, that Wheeler had bought the stock and had borrowed the money from the Anglo bank with which to pay for it, and had paid the sellers cash. That between the years 1923 and up to the first Otto report in August, 1924, they were anxious to have the Wheeler obligations paid although at that time they thought they were perfectly good, but he never discussed the matter; that there were none of them that were anxious to loan Wheeler money in recent years; that the Wheeler loans were criticized by the Examining Committee in 1924, and the bank didn't want to lend him any more money, but wanted him to clean up his obligations, ***and it was at that time that Wheeler and his line were considered to be in charge of Mr. Olmstead, and that he Olmstead had handled it from the start and was continuously reporting what success he was having to the Board, and there were criticisms made of the Wheeler Loan in 1925; that most of the conversations they had were with Olmstead and not with Wheeler, as to the condition of the Wheeler loans, and they relied principally upon the reports which they got from Olmstead each week, although***

some of the directors may have talked directly to Mr. Wheeler—the witness did not recall that he had talked to Wheeler about it until after February, 1927, and when he talked to McIntosh in June, 1926, about the change in management, he had a copy of the last examination, the letter, before him and they asked just what he meant by that and he said of course he meant a change in the presidency; the witness did not recall that he said why, and could not recall any conversation with Metschan, or Stewart, that he had had as to why he recommended the dismissal of Olmstead, but presumed it to be because of the unsatisfactory showing that the bank had made in the last few years. Witness did not recall whether or not he had communicated to Olmstead what the Comptroller had said about the change in management, but of course Olmstead had seen the criticism. That it would have been somewhat embarrassing to him to have spoken about it, since it had been decided that it would not be wise to make a change as Olmstead was thought to be the person who could more readily get the subscription of $37.50 per share out of the stockholders, and to assist in working out the matter, getting the new corporation worked out; that they were anxious to have Wheeler pay up, and the Wheeler line was one of the objects of criticism as having been carried too long at that time. *That the letter of April 26, 1926, was the letter to which he referred, and as to what he meant as written by the Comptroller*, and that the witness

hesitated to speak about the matter, and did not recall any of the directors speaking to Olmstead about it, as they did not want to discourage him in putting his full heart in the work in regard to the corporation. Witness did not remember whether he wrote a letter or sent a telegram back to Washington stating that it would be all right for Mr. Olmstead to go ahead and see the stockholders.

AT THE REQUEST OF MR. HART IT WAS HERE STIPULATED THAT THE RECORD SHOULD SHOW THAT WHEN OLMSTEAD AND WHEELER WERE INDICTED BY THE FEDERAL GRAND JURY BECAUSE OF THE TRANSACTIONS OF THE RECEIPT AND GIVING IMMEDIATE CREDIT FOR A LARGE VOLUME OF McCORMICK LUMBER COMPANY CHECKS, WHICH CHECKS WERE RETURNED UNPAID, AND THAT BOTH OF THESE MEN WERE LATER TRIED AND CONVICTED ON THAT CHARGE IN THIS DISTRICT. (r. 1082)

SINCE WHICH TIME BOTH MEN ON MAY 15, 1929, WERE INCARCERATED FOR THE PERIOD OF THEIR RESPECTIVE SENTENCES IN McNEILL ISLAND AND ARE NOW SERVING TIME.

SPECIFICATIONS OF ERROR

(Rule 24 (b))

First Specification. The Court erred on the record in holding that these suits were not of a

local nature, and therefore erred in discharging defendant Chauncey McCormick, a director and resident of Illinois.

Second Specification. The decree of July 11, 1928, of the court below was and is erroneous in holding the said bills of complaint herein were without equity, that the allegations therein failed of establishment that the complainants were not entitled to relief as to any of the defendants and that the causes be dismissed.

Third Specification. That there was error in failing to hold and decide in conformity with the evidence and proof in said cases and upon the theory of the complainants' bills that the respondents were liable to the complainants as trustees, and that is such trustees they were liable for resulting injury for want of performance of their trust as the evidence showed it to be as directors of said bank.

Fourth Specification. That there was error under the evidence and record in this case in failing to hold and to decide that the defendants had mismanaged and did mismanage and had not conducted and did not conduct the business, assets and property of the Northwestern National Bank in the interest of the stockholders of said bank.

Fifth Specification. That there was error by the court below upon the whole cause in failing

and refusing to consider the evidence of the complainants and applying the same to the conclusion that the critical condition in which the bank came about to be in March, 1927 was due to the acts of said directors, respondents herein, and in failing to hold and to decide that they had reason and suspicion to know that the transactions which had withdrawn large amounts from the bank within the past year or so prior to its closing were plainly before the directors under the facts and circumstances which it was their duty to prevent.

Sixth Specification. That the action of the court below is erroneous in that it failed to give any consideration in conformity to the evidence of the transactions indulged in by the majority in control represented by said directors which subjected the stockholders and these complainants, appellants herein, to contingent liability as such as well as to an additional liability to the undertaking banks without the consent of such stockholders.

Seventh Specification. That under all of the evidence and the allegations of the bill the decree should have been for the complainants and against the defendants, respondents herein.

BRIEF OF THE ARGUMENT

(Rule 24 (c))

The arrangement of this argument is designed to follow the specifications of error in their order as made.

FIRST, *then, the discharge of McCormick.*

Where is the *situs* of the bank's assets and affairs? In the state and residence of the banking association or in the state and residence of the director?

Must the director who swears honestly and diligently to administer the affairs and assets of the bank at its place, be favored in event of loss to answer responsibility in the state of Illinois, at *his* place?

Are the equitable claims of stockholders of any less "LOCAL NATURE," or the accounting for dissipated assets of the bank of such situs, that the Court of the district where the bank is situated is without jurisdiction?

Then, if so, all bank directors need do is to reside in jurisdiction outside and away from the place of the bank to escape being called to account for their failures of duty and diligence in behalf of the bank.

Certainly the oath of office of all of these Directors applied to the doing the business of the bank at Portland, Oregon. Its assets, the equitable claims of the stockholders thereto, and the relations of the stockholders thereof were in no other place than here in the District of Oregon.

The defense succeeded in convincing the Court that McCormick could only be sued in the district of his residence, and disregarded the local nature of the whole matter.

No express case involving a bank director has ever been decided. By analogy, however, with respect to interests in personal property, there are cases in this district as well as others that support the position of appellants.

> *Consolidated Interstate Mining Co. v. Callahan*, 228 Fed. Rep. Page 531, *A decision by District Judge Dietrich.*

The assets of the bank and the means by which any accounting could be had were all in the District of Oregon, unless it is to be said that whatever liability came about in the accounting of the bank's affairs would be a personal liability of the director enforceable in Illinois. Well, that is a matter of enforcing the judgment of the District of Oregon as against property in another district for the purpose of getting satisfaction.

> *Chase v. Welzlar*, 225 U. S. 79, 56 L. Ed. 990.
>
> *Jellenick v. Huron Copper Mine Co.*, 177 U. S., Page 1, 44 L. Ed. 647.

The District Court of Oregon does not acquire jurisdiction in this case alone by diversity of citizenship but because the activities of this bank are

governed by federal law, and because the banking association is an instrumentality and fiscal agency of the United States, and it is and was with respect to its management that the court's jurisdiction was sought.

In *Dougherty v. McDowell*, 276 Fed. 728, it was held that shares of stock in a corporation have a *situs* as property in the state in which the corporation is organized, although the corporation has no other property there and transacts no business except to hold its annual meeting.

Myers v. Occidental Oil Corporation, 288 Fed. 997, and

France v. Buder, 11 Fed. (2d) 854.

are illustrations of the personal property rule and the local nature giving situs characteristics.

The Circuit Court of Appeals, Second Circuit, in *Norrie v. Lohman*, 16 Fed. (2d) 356, at page 358, distinctly held that the interests represented by shares of stock have a *situs* for the purposes of jurisdiction in the state where the corporation is engaged in business, and denominated the proceedings with respect to stock as *quasi in rem.*

Suppose McCormick has been sued in the Federal Court in Illinois by either of the complainants, in the interests of the bank and all other stockholders it can readily be seen that by virtue

of the nature of the proceeding itself (as it were stockholders upon their relation to the bank), McCormick could well say that the bank could not be a party against him in Illinois where he had not agreed to serve it, and that his duties were to be performed in Oregon.

If the jurisdiction is to be taken as a matter of personal privilege to the defendant, it follows that bank directors residing out of the district where a national banking association is located cannot be sued if the trial court is right. It may be said by analogy that if any receiver or agent of the Comptroller had sued for this bank the jurisdiction is specifically venued by statute in the District where the bank is. Naturally, not because of the statute, but of evidence.

SECOND, *then, Second and Seventh Specifications considered together.*

The decree of July 11 on which this appeal was taken, held the bills of complaint to be without equity, that there was no evidence to establish the allegations, and that the complainants were not entitled to any relief; and the appellants complain that under the evidence (summarized statement of which is shown in this brief), and the allegations of the bills of complaint, the appellants were entitled to consideration in equity and to an accounting and relief as prayed.

The pleadings so far as the two complaints are concerned do not differ except as to the ownership of the stock and the fact that one complainant alleges that offers were afterwards made for the Wheeler stock to get it into the combination on the basis of 10 cents or $10.00 per hundred. *The answers, however, are essentially peculiar.*

The court will find admissions of fact from each of the defendants, represented it is true by different counsel, but who seem to follow the draft of the pleadings prepared by Messrs. Carey & Kerr for the defendants they represented including the bank. Except for a difference or two upon the part of the defendant Spalding and upon the part of the defendant Morden, the wide differences and inconsistencies are found in the answers of the defendant Olmstead; and as he tells his story in his pleading it is entirely inconsistent with the stories of the other defendants. Substantially, too, Olmstead testified as he plead. The other defendants testified to conclusions and opinions or that "*they could not remember*," or "*could not recall*," but where any of them gave a fact it was in accord with Olmstead's pleadings and testimony, in all of the many particulars.

At great cost to the appellants all of the pleadings in both cases have been put in the record, though the cases were tried together as one case, substantially for all of the stockholders in behalf

of the bank. Obviously, because of the control of the stock by the Pittock Estate, Morden and Price, trustees, the bank itself as alleged was not or would not be authorized to sue them and their fellow directors. The evidence bears out Olmstead's pleading and supports the pleadings almost in every identical particular of both complainants. In fact, there is not one item that was alleged that did not have definite proof either in the examiners' reports introduced in evidence, or in the records of the bank introduced through the defendant Skinner. The explanations that the defense made about these transactions were as matter of course their interpretations of them under the law, but whatever interpretation is given to them it cannot be an interpretation that does not satisfy the law, and the duty required by law.

As set forth in the opening statement here in this brief the gist of this whole matter is inattention to and mismanagement of the affairs of the bank. What these directors were doing were not casual things, but deliberate assertions of activity of supervision in response to official complaint. And despite the disclaimers and denials of the defendants, it does not seem that anybody could do otherwise than attribute to them the knowledge which readily could have been obtained with respect to the financial condition of this bank in the course of the supervision which they professed to be actively exercising.

Please note in the letter of the directors dated October 23, 1925, addressed to Comptroller hereinbefore set forth, and the reply of the Comptroller under date of November 17, 1925 thereto, followed by the communication to the same Directors by the letter of the Comptroller of Currency, dated the 26th day of April, 1926 (set out herein in the summary of the evidence for the information of the Court) it distinctly and unequivocally appears that the very things that were to be done were pointed out to them by the officials of the United States. These are the very acts of failure and omission that received condemnation by the Supreme Court *in the Yates case*, 240 U. S., Page 562.

Moreover, these directors appointed a Committee in May to go and see the Comptroller in June, 1926. Olmstead could not go on account of the sickness of his wife, so Price, Metschan and Stewart went, and the whole summer of 1926 went by.

Now comes the astonishing aspect and position of these directors, that is, that the report of Harris based on the examination September 21, 1926 was to help them to get a company organized to take over the undesirable non-bankable assets. Here is what the national bank examiner said in his letter (hereinbefore quoted in the summarized report of the evidence for the aid of the Court), on the 27th of October, 1926, to Olmstead:

> "Estimated losses impair your capital in the sum of $237,460.78, the only legal means for the restoration of which is an assessment. WHICH WOULD NOT ONLY CAUSE UNFAVORABLE COMMENT BUT WOULD LEAVE THE BANK WITHOUT A SURPLUS FUND."

It does not look likely or reasonable that the purpose the respondents assigned to this report can be interpreted consistent with this language.

At this particular time there was over four million of doubtful assets and losses, and the examiner went on to say that it was entirely inadequate to do otherwise than to remove all of these possible losses and doubtful assets so that the bank might take its proper place among metropolitan institutions. If the reasons assigned by the defendants is as they endeavored to make the Trial Court believe, *why did the Comptroller* on December 2, 1926 write the Board of Directors referring to the Harris report of September 21, 1926 *and call attention to the impairment of capital surplus and undivided profits?*

During this very time there is an entire want of record entry to show that the Board of Directors considered the Examining Committee's report or acted upon it until February 16, 1927. That is the Examining Committee's report in November, 1926.

But the Board of Directors on the 11th day of

December, 1926, holds a meeting considering the Harris report, recognizes the comment and criticism, and says they were given special attention and adopts the suggestion to organize a company to take out non-bankable assets.

It is perfectly plain from the evidence hereinbefore quoted, particularly of that of Skinner and the report of Examiner Wilde of March 25, 1926, that the Board of Directors had before them the entire matters referred to in the respective bills of complaint as therein alleged, and which are shown in the Wilde Report in the quotations hereinbefore made (Pages ... to ...) and they were told that the bank had been doing an illegitimate business, the words used were "*Beyond its legitimate field of banking,*" and wound up with the statement that "*these transactions were investments which your Examiner considers as entirely outside of the purpose for which banks are chartered.*" This was written March 25, 1926, and became and was the foundation of the letter from the Comptroller of Currency to the Directors on April 26, 1926; so there is no doubt of knowledge, notice and full information.

How, then, can it rightfully or justly be said that there was no evidence to support the allegations of the complaint, that there was nothing upon which equity could exercise its functions?

Judge Robert Sharp Bean, the trial judge in the

criminal case against Olmstead and Wheeler was the trial judge in this case; and in the criminal case he delivered the law principles as follows:

> "Now under the law of the United States a given number of persons may, by complying therewith, obtain a charter or authority to set up, open and operate a federal reserve bank. The association so organized and formed becomes a corporation with an entity and a legal individuality separate and distinct from its officers and stockholders. It is important, I think, in a trial of a case of this character, to keep that fact in mind, ***and to remember that the officers of a federal reserve bank are not the bank, but simply its agents,*** authorized and empowered to supervise, and manage and control its affairs. After a bank has been organized and authorized to do business, it may receive deposits, keep the accounts of its customers, pay checks, make loans, discount bills, issue drafts, and in fact do a general banking business. It is apparent therefore that the interest of the depositors in a bank, ***and of the stockholders*** and customers depend largely upon the integrity and financial standing of the institution, ***and as its officers and those in control thereof,*** and charged with the conduct of its affairs, ***may through carelessness, recklessness or violation of the law, dissipate and waste the funds,*** the law has provided certain penalties and certain provisions to prevent matters of that kind. The law does not require or compel any person to become an officer or employe of a federal reserve bank. No one is compelled by law to discharge any of the duties which it prescribes, or to place himself in a position where it is possible for him to commit any of

the crimes denounced by the statute. ***If, however, he voluntarily becomes an officer of the bank, the law requires of him the faithful and honest and exact performance of his duties.*** And in order to accomplish this, it has provided, among other things, that any officer, director, agent or employe of any federal reserve bank who wilfully misapplies the moneys, funds or credits of the bank, with intent to injure or defraud the bank, and every person who, with like intent, aids and abets him in so doing, shall be guilty of a crime, and if convicted shall be punished as in the statute provided."

Record (*U. S. v. Olmstead and Wheeler*)
Volume 6, pages 1632 and 1633.

"Before the law all persons stand on the same footing. It is the duty of courts and juries to administer the law without respect to persons and do equal justice to all without regard to rank and standing."

Record (*U. S. v. Olmstead and Wheeler*)
Volume 6, page 1651.

THIRD, *then, the Third, Fourth, Fifth and Sixth Specifications considered together.*

So arranged to avoid duplication of argument and presentation of authority.

The record, at this point, presents to us a bank that had been continuously reported to the Comptroller and to the public as in excellent and unusual condition, and of rapid and continuous growth, upbuilding and progress.

The record also shows that as early as March, 1926 the account of McCormick Lumber Company was opened and the check transactions almost immediately reached large volume by May of that year, and in June and July, Hoyt and Bates and Longshore and Brown knew and called the attention of their superior officers to as much as $200,000.00 of these checks floating around.

The record also significantly showed that in the Wilde report of March 25, 1926, this same practice as outlined by Skinner in language as follows, was called to the attention of the directors:

> "*Sundry drafts in transit* discounted by J. E. Wheeler are drawn by J. E. Wheeler upon Wheeler and Wheeler Lumber Company at San Francisco, and Schmearbaugh, Pennsylvania, and are carried in account "*Bills in Transit*" and should be carried in "Loans and Discounts," and that one of these drafts was a renewal and that the *McCormick Lumber Company protested checks and Wheeler-Olmstead Company protested checks, both carried as Cash items*, were eliminated during the examination, having been taken up by J. E. Wheeler and McCormick Lumber Company. (PLEASE NOTE) (our words).
>
> "The original checks were payable to and credited to the account of J. E. Wheeler, and at this examination classed as 'Excess Loan' with direct liability to J. E. Wheeler."

The examiner furthermore tells the Board that this entire Wheeler loan was the elimination of

the McCormick indebtedness at that time of some $87,000 *but the addition to the loan of the Discount and Cash Items listed above.*

Then in the face of this we have the visit to the Comptroller at Washington by three of the Directors obviously to see what was to be or could be done. That was in June, 1926, by Price, Stewart and Metschan.

All of the Wheeler transactions were in the bank, and a large number of other items too numerous to mention, and the Examining Committee was examining, and FRALEY says in detail in the evidence hereinbefore quoted what he told them to do, and called their specific attention to the very things that the complainants in this case alleged about in their complaints. And yet Mr. Skinner, Mr. Stewart, Mr. Price, Mr. Collins, Mr. Metschan and Mr. Spaulding, say they knew nothing about it. IT WAS THEIR BOUNDEN DUTY TO KNOW.

In this state of affairs let us pass the discovery of the float as it is stated to be by them February 11, and we come to the dismissal of Olmstead and the institution of Price, with the same directors, and we are told that O. L. Price has been elected president of the bank and will have active charge of the bank's business, and it will continue to serve the public *as a financial institution of first importance and known responsibility.* This was March 2, 1927, and in 27 days the bank closed its doors.

The first part of this statement of March 2nd, 1927, is in accordance with the allegations of the bills of complaint that the Pittock Estate had acquired a large measure of interest and control in the bank corporation. *Three days after* this publication which was given out by the officers and directors of the Northwestern National Bank as the proofs show, *Harris made his famous report of March* 5, 1927, *and the directors wrote the letter of March* 18, 1927 *to the Comptroller of the Currency hereinbefore set out.* Space does not permit of its being set out again, but a reference to it discloses that no correction had been made of the previous impairment of capital surplus and profits.

Do not let us forget that this had previously been called to the Board's attention in September, 1926, that the Board knew by the Wilde report in the early spring of 1926 a similar state of affairs. Do not let us forget that as early as the 28th of July, 1924, Mr. McIntosh himself wrote to these Directors the letter hereinbefore set forth, showing the same situation of the figures applied to the impairment of capital, surplus and profits of this bank; and yet the directors were reporting it in sound condition and of known responsibility and continued subjecting the stockholders to that imputation of care and attention and responsibility to the public which of course as directors they were bound to protect.

But "LEST WE FORGET," each and every one of these defendants who testified SAY THE WHEELER MATTER WAS LEFT TO OLMSTEAD.

The By-laws of their own institution prohibited that; and Price was Chairman of the Board when Olmstead was President. The directors admit in their letter of March 18, 1927, that the bank had been *under criticism* from Washington *for a number of years*, and in this letter notwithstanding the publication of March 28, 1927 in the Oregonian, they were unanimous in the request that the Comptroller issue a formal notice of impairment of capital. They admit in their letter that they had no fault to find with the classification of assets made by the Examiner. When the Examiner, however, made a suggestion about notes, they very readily stated why they did not desire to give notes as directors.

Nevertheless, their attention was called that losses had been estimated on loans classed as excessive, and that the directors had been requested to remove these notes personally (PLEASE NOTE THAT).

They discussed the law with the Comptroller and make the aspiring statement "WE DO NOT ADMIT ANY LIABILITY IN THIS CONNECTION." Well, they may not admit it, but at that time, the law said the liability existed, and officials of the

United States charged them with it,—how could the Trial Court ignore such evidence? Then they followed this in this letter with this statement, *"While there are excessive loans in the bank, and at least one of these loans became excessive in direct violation of the resolution of the Board,"*

If Your Honors please, this famous resolution of the board insiduously referred to, was that of October 9, 1924, when Olmstead was away, and there is no evidence that they ever did otherwise than continue the same activity by the same loaning officers that they always had. Then this letter denies that they wished to avoid comments incident to an assessment, and the advertisement and sale of delinquent stockholders. Then comes this second remark, *"Some months ago you suggested that we consider a change in the management and a change recently occurred, by the resignation of one of our active officers whom we believe to be the one referred to in your letter."*

OPENLY FRANK, WASN'T IT?

The testimony of Mr. Price on this subject is very enlightening (Pages ... to ... in this brief). This letter of April 18 was signed by all of the then directors except Olmstead and McCormick.

But the astonishing thing about this whole matter is that for weeks previous and commencing as early as 1923 the Pittock people were attempting to sell the bank, and Price and officers of the bank

had been negotiating in January and February, 1927, with the First National and United States National Bank, respectively, of Portland for a disposition of the Northwestern National Bank. Indeed, prior to the time that Price became president. Everyone knew of the failures of these negotiations, and yet they advertised to the public and made statements as late as March 23rd of the unimpaired condition of this bank. Please note, Your Honors, that the published statement of March 23rd was five days after this letter they wrote of March 18th, wherein they admit impairment of capital, undivided profits and surplus and discuss a way to avoid it, and yet include that very capital, surplus and profits unimpaired in the statement published March 28. The next day the bank closes; and Mr. Ainsworth and Mr. Fraley said with a $7,000,000.00 shortage.

It needs little further comment on the facts to address ourselves to the law; but let it be presented in conclusion, with respect, that on the 29th of March as hereinbefore set out, (*and exactly what they did as set forth in previous pages of this brief in the summarized evidence*), these directors made and passed resolutions which speak for themselves, and put it in the power of Price and Morden for themselves and accompanying directors for the entire disposition of this bank, and then turned it over under the proposal therein made which consisted of the contract of March 29, 1927, without

any proceeding required by law to obtain the single assent at that time of any stockholder whomsoever, save those of course who could be said as the result of being directors to be stockholders; and as to them no step required by law.

But the point is that the law says that it is the stockholders who shall say what shall be done with an institution of this kind in that situation; AND NOT THE DIRECTORS.

The evidence shows that there was no resort to a deliberative assembly of the stockholders or any advice or information to them given prior to March 29, 1927, on which day the special meeting of the directors was held and no notice whatever was purported to be given until March 31, 1927, when the damage, injury and harm had then been done.

And the evidence shows that the directors were wholly without power and authority to make a new and independent relationship or contract a liability for non-assenting stockholders, although they had previously made combined and confederated among themselves upon an arrangement and agreement to escape their own liabilities if possible by abdicating their powers of management of the business as it then existed to the other banks and afterwards go into liquidation, and they were advised in the start that other non-assenting stockholders objected to this, to-wit: Cotton and Griffith, and as soon as these complainants were advised and knew

it they also dissented, for it is apparent from the evidence that the larger interest acquired by the Pittock estate as advertised March 2, 1927, consisted of the deposit of $929,600.00 which was calculated to remove and take up and therefore became the money of the bank when they did take it up, to-wit, the alleged Wheeler float, apparent from the statement book of February 28th and March 1st resolved into the entry of March 2, 1927.

Between February 28th and the 3rd day of March these entries were made under the direction of Mark Skinner, one of the vice presidents, with the recorded participation of the very individuals who are defendants herein in sundry amounts either then or afterwards to be made of the items designated as the Wheeler float, and it is obvious that the payment or contribution of the same is an admission of liability therefor.

The much talked of war commenced in 1914. But there was not a war loan transaction in taking over Merchants National Bank acquired October, 1915.

Sensenich says most of loans 1918 to 1920 and all prior to March, 1923. Hart says the complaint items were war loans accumulated in the war period. In July, 1922, however, the increases of capital stock were made and the bank published with the knowledge of the directors in the Oregonian, July 2, 1922, to-wit:

"It was during the war period from 1914 to 1918 that the Northwestern National Bank's growth was most rapid. In that four year period it led all of the country in percentage of growth."

"It has attained a place among the strongest capitalized banks in the Northwest."

Now this capital (see Burckhardt correspondence) was taken by some and not others and amounted to 10,000 shares at $150.00 per share or $1,500,000.00, which comprised according to answer of defendant Spaulding voluntary contribution of $500,000.00, of which $35,000.00 he says went to *"earnings account"* and $150,000.00 to surplus, thereby increasing surplus to $400,000.00 from $250,000.00 surplus theretofore carried, yet the record is that $389,000.00 was then charged off. These loans then must have been renewed and extended lest they would outlaw within the five year real estate carry permitted when that character or within six years for want of payment—hence each successive board knew this and acted accordingly clear into March, 1927.

That during all the times from the increase of stock in July, 1922, each and every officer and director of this bank knew that often banks carry as cash "CASH ITEMS" items on which cash has been paid out but for some reason the items have not been charged to the accounts against which they were drawn, and it was their duty to carefully examine these cash items, for it was known in 1924

that similar items had been carried and they made a notation of their refusal to advance credit deliberately on October 9, 1924, as shown by their own record and that various checks, notes or other items were then deemed by them to be irregular and they knew it to be the duty of the examining committee and of themselves that stale or irregular items should not be carried and they knew and had cause to know that lists of all uncurrent or irregular items had been around the bank and it was their duty to make them up, especially those that would not be cleared out in the following day's business, and it was also their duty to see that there was prepared a record of all such items and satisfactory explanation given concerning each one, but instead of doing so they leave everything to Olmstead, although the by-laws otherwise provide and although Price knew, Skinner knew and Stewart knew and all the junior officers in the bank did know, as well as the clerks having the matter in hand, what was going on, and nevertheless they wholly ignored and failed to use diligence in acquiring such knowledge of the business as was open to them and they therefore cannot now be heard when sued to say they were not apprised of facts the existence of which are shown by the books, accounts and correspondence of the bank open and observable to all of them, and it was a breach of their duty to the stockholders in each and every instance in the course of the conduct of said bank to allow said things to happen.

The claimed effect of the deflation period disregards the revival period in the six years thereafter.

On the authority of Irving Fisher, Economic Professor of Yale (N. A. R. Vol. 228 No. 1, p. 74) we find this said of the recovery period:

> "Thus the years of post war recovery, especially after the deflation of 1921, have witnessed the largest increments of real income of any like period in our industrial history. Production has augmented, real wages have increased, great mergers have reflected the opportunities of mass production, etc."

According to the National Bureau of Economic Research American income in 1921 was nearly 63 billion dollars. It rose to 90 billions in 1926, and is constantly going higher.

Judicial information and judicial knowledge will not disregard these plain facts.

Listed and carried as cash may be found "Exchanges for Clearing House," "Checks on other banks in the same city or town," and "Checks and drafts on banks located outside of the city or town." These items should be separated from and not confused with "cash items," for they are current items which will be cleared in the course of business on the following day. These items should be listed and compared with the totals shown on

the "Cash Book," to see that they are carried for the correct amounts." (Major on "Duties of Directors, etc., p. 117.)

The readiest means you have of finding out what becomes of the funds of a bank is by studying the statements published periodically by the bank. Every dollar of assets and liabilities is set down there and if you know what the figures mean you can form a clear judgment of the actual condition of the institution.

> "Often banks carry as cash, 'cash items,' items on which cash has been paid out, but for some reason the items have not been charged to the accounts against which they are drawn. The cash items should be carefully examined by the Committee. It is sometimes found that the officers of the bank are carrying as cash items various checks, notes or other items which are irregular. The Committee should see that no 'stale or irregular' items are being carried. A list of all uncurrent or irregular items, those that will not be cleared out in the following day's business, should be prepared and a satisfactory explanation should be had concerning each such item." (Major on "Duties of Directors, etc." p. 117.)

That while knowing and having cause to inquire for further knowledge they allowed "cash items" of more than $200,000.00 in July, 1926, as fictitious credits in the transactions of said bank, to which the attention of Price was then specifically drawn, to grow and increase through August and the rest

of the summer and fall of 1926 until Skinner's previous as well as his specific attention on February 10, 1927, was directly called to about and over $800,000.00 of such cash items outstanding, although significantly the examining committee makes no record or any comment to the bank or officials when it met May 18, 1926, nor indeed when it presented its report of December 7, 1926, to the directors on February 16, 1927, at which time Skinner knew, Price knew, and every other director and officer had the opportunity to know, *and all the junior officers in the bank did know*, that *"sundry banks account"* was carrying increasing amounts of transit items sufficient to excite any one's attention and *"cash items"* and *"bills in transit"* continually and daily increased as these three (3) records or accounts so named were exhibited on the daily statement record of said bank during and from May and June, 1926, to and inclusive of March 2, 1927, all the time as such daily record was so made every day to be placed before and seen by the directors and officers of said bank in a convenient place on Brown's or Jones' desk in the officers' quarters of said bank, where it and all thereof was easy of examination, inquiry, notice and knowledge during all said times, but the said directors utterly failed to act thereon or do anything in wilful violation of their duty to watch over and guard the interests committed to them and in violation of their respective oaths of office and the obligations they each thereby assumed and to the prejudice

and destruction of the interests of stockholders of said bank and the bank itself.

The defendants participated in or assented to so conducting the bank's affairs knowingly to maintain a fictitious valuation upon the capital stock of the bank affecting these complainants and all other stockholders.

That these defendants knew and knowingly brought about and into the published reports and records of the bank the totals of the very loans in the total of maintained loans and discounts at said times as criticised and condemned as the objectionable paper by the examiners in turn and by the Comptroller in particular, and knew and willingly permitted these to be part and become elements shown in the published and included with the records and reports of the bank and consequently at the time of official calls that such reports Dec. 31, 1924; Sept. 28, 1925, Dec. 31, 1925, April 12, 1926; June 30, 1926; Dec. 31, 1926 and March 23, 1927, were wholly incorrect and therefore did not truthfully reflect or inform stockholders or the public of the true and actual condition of said bank and these acts are violations of law, both actually and constructively.

Under the by-laws of this bank as shown in evidence the chairman of the board and the board of directors and not the president were the authorized heads of the bank and the evidence shows that

a change in management was suggested as far back as 1922 or prior to March 10, 1923, and it was suggested again and finally confirmed by the board of directors to the Comptroller and yet it is said that in the indulgence and carelessness which is exhibited by the testimony in this case in the various transactions the matters were left to Olmstead and he who does a thing through another does it himself. Any indulgence or carelessness whatever well exhibited by the condemnatory resolution of October 9, 1924, show knowledge of what was going on and the transactions of 1926, daily occurring importing knowledge of what was going on. A knowledge which was readily acquired, demonstrated that some effort had to be made to say that those in charge of the affairs of the institution would keep within the statutes and the by-laws which control. The evidence shows that the directors and committee failed, as well as the chairman of the board, to bring about the proper administration of the bank's affairs in these particulars. The evidence shows that all these directors participated in and approved a long continued carrying on the books among the loans and discounts of a line or lines which they knew to be worthless and required to be retired in amount sufficient materially to affect the standing of the bank. In this position they were bound to know and act that under the practice such worthless paper would become as the practice was prevailing in said bank an element of its published reports

and that these reports would not reflect the true condition of the bank, and each and every one of said directors while in this position and allowing said reports to be published and permitting the making of the same were guilty of misconduct amounting to violation of law and their failure to act does not excuse them.

Beyond these specific matters there was made at the trial specifications of inattention and mismanagement in several enumerated particulars deemed to be fully established and proved by the evidence; but the trial court disregarded them, as follows:

In not seeing what was open, visible and notorious to be seen in and about and upon the records of said bank.

In not acting promptly upon what was, or to be, seen and known and thereby to be known in the records of said bank so that said bank might have and obtain prompt and vigorous management, direction, supervision and activity in regard thereto.

In not forcing Wheeler's liquidation in sale of his publishing business, or other properties, and call his then loans, that the burden of his indebtedness to said bank as then were known might be relieved.

In waiting and delaying action on matters of importance until emergency was thereby created—(a) in conditioning assets of the bank; (b) by the increase of Wheeler's indebtedness and financial embarrassment; (c) by failing to deal for the sale of the paper on frequent proffered occasions, of Telegram Publishing Company, and until that company went broke.

In dallying over a period of years with Comptroller and failing with promptitude to clean up the matters of financial entanglements which finally overtook them, and each of which were by said Comptroller called to their attention in writing.

In surrendering to Price the management of the Bank in a very critical period of its career.

In putting in the position of president of the Bank Price, as manager of the "Oregonian," and trustee of the Pittock Estate. (See announcement March 2, 1927.)

In failing to allay and remove interior dissension and sustain coordinate effort within the Bank for if change of management in presidency was intimated or suggested as early as they say and as early as the year 1923 as the evidence shows, then it was negligence to wait until March 2, 1927, with the progressive and increasing embarrassment of the bank's affairs, before they effected the change, and in so doing then attract to said bank want of

confidence and impairment of position in the mind of the public.

In bringing about an entire change of management in bank policy by the Pittock Estate and the induction of Price, whose previous dealings with directors' knowledge with the competitive banks had already disclosed to the public the weaknesses of the institution.

By so acting and doing as to destroy the confidence and thereby impair the belief of the public in the soundness of the institution and the correctness of published bank assets of alleged known responsibility and solvency as in said reports set forth.

In knowingly creating and permitting an emergency to come about and develop in the affairs of the bank through their own acts, or by acts which could have been prevented in the ordinary exercise of business judgment, whereby Price was allowed to negotiate the private and confidential business of said bank to and with the United States National Bank and the First National Bank, of Portland, Oregon.

In knowingly and willingly permitting non-included stockholders in the deal they did make to be and become liable for these several derelictions of them, the said respondents, by (a) charging liability over by virtue of statute; and (b) charging

liability over by virtue of contract, to the First and United States National Banks, March 29, 1927, without first taking any deliberative vote, determination or consideration whatever of the whole body of stockholders in said bank.

By knowingly and willingly bringing about liquidation at their own initiative without first taking the deliberative determination, consideration and vote of all of the stockholders on that subject.

If the Court believes the evidence of Ainsworth and Dick then the impairment was an accomplished fact when the negotiations were first on with the two other banks in February, and the witness Stewart agrees with Dick that cash items treated as this bank treated them required greater reserve cash in Federal Reserve Bank.

By making and renewing excessive loans, and knowingly and willingly permitting them so to be made, against sound business policy and against the law and thus subjecting the bank and its stockholders to unnecessary danger of collapse of the bank.

By making incorrect reports to the Comptroller and purposely keeping the stockholders ignorant of the true condition of the bank whereby many of them were induced to hold on to their stock until it became valueless.

In disclosing the private and confidential affairs of the bank to its competitive banks, U. S. National and First National and in entering into negotiations for the sale of the bank with said competetive banks without knowledge or acquiescence upon the part of the stockholders under the circumstances in February and March, 1927, impairing the said bank; and its then condition was permitted by said directors having then cause and occasion to know that the state of the bank's then impaired condition and affairs would become known and subject all stockholders' interests to ultimate loss and disaster.

Independently of statute, one in control of a majority of the stock and of the board of directors of a corporation occupies a fiduciary relation towards the minority stockholders, and is charged with the duty of exercising a high degree of good faith, care, and diligence for the protection of their interests, and every act in his own interest to the detriment of the holders of minority stock is a breach of duty and of trust, which entitles a minority stockholder to plenary relief in equity.

The rule is fundamental that one in control of a majority of the stock and of the board of directors of a corporation occupies a fiduciary relation towards the minority stockholders, and is charged with the duty of exercising a high degree of good faith, care and diligence for the protection of such minor-

ity interests. Every act in its own interest to the detriment of the holders of minority stock becomes a breach of duty and of trust, and entitles to plenary relief from a court of equity.

> *Jackson v. Ludeling,* 88 U. S. (21 Wall) 616, 624, 625, 22 L. Ed. 492;
>
> *Jones v. Electric Co.* (C. C. A. 8), 144 Fed. at page 771, 75 C. C. A. 631;
>
> *Wheeler v. Abilene, etc., Bldg. Co.* (C. C. A. 8), 159 Fed. 391, 394, 395, 89 C. C. A. 477, 16 L. R. A. (N. S.) 892, 14 Ann Cas. 917;
>
> 3 Clark & Marshall on Corporations at page 2289.

Where a board of directors, or a majority of them, are acting for their own interests in a manner destructive of the corporation itself or of the rights of the other shareholders.

> *Hawes v. Oakland,* 104 U. S. 450, 460, 26 L. Ed. 827.
>
> *Corbus v. Gold Mining Co.,* 187 U. S. 455, 463, 23 Sup. Ct. 157, 47 L. Ed. 256;
>
> *Gamble v. Queens County Water Co.,* 123 N. Y. 91, 99, 25 N. E. 201, 9 L. R. A. 527.

Such latter action is a breach of fiduciary relation. Breach of duty and abuse of fiduciary obligation do not necessarily involve "intentional moral delinquency." If the act amounts to what the law considers a breach of trust, a disregard of duty, it is sufficient.

Dodge v. Woolsey, 18 How. 331, 345, 15 L. Ed. 401.

See *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 553, 15 Sup. Ct. 673, 39 L. Ed. 759.

A breach of trust by one occupying a fiduciary relation, even while in the exercise of a lawful power "is as fatal in equity to the resultant act or contract as the absence of the power."

Jones v. Electric Co. (C. C. A. 8) 144 Fed. 765, 771, 75 C. C. A. 631;
3 Clark & Marshall on Corporations, p. 2289.

Hyams v. Calumet & Hecla Mining Co., 221 Fed 529, at page 529, 537 and 543.

"THE FRAUD OR BREACH OF TRUST OF ONE WHO OCCUPIES A FIDUCIARY RELATION WHILE IN THE EXERCISE OF A LAWFUL POWER IS AS FATAL IN EQUITY TO THE RESULTANT ACT OR CONTRACT AS THE ABSENCE OF THE POWER. THE RELATION OF A STOCKHOLDER TO HIS CORPORATION, TO ITS OFFICERS AND TO HIS CO-STOCKHOLDERS IS A RELATION OF TRUST AND CONFIDENCE."

Jones v. Missouri-Edison Electric Co., (C. C. A. 8th C.), 199 Fed. 66.

"Such a majority of the holders of stock owe to the minority the duty to exercise good faith, care, and diligence **TO MAKE THE PROPERTY OF THE CORPORATION IN THEIR CHARGE PRODUCE THE LARGEST POSSIBLE AMOUNT, TO PROTECT THE IN-**

TERESTS OF THE HOLDERS OF THE MINORITY OF THE STOCK, AND TO SECURE AND DELIVER TO THEM THEIR JUST PROPORTION OF THE INCOME AND OF THE PROCEEDS OF THE PROPERTY."

Jones v. Missouri-Edison Electric Co., (C. C. A. 8th C.), 199 Fed. 66.

Affirmed, 203 Fed. 946.

"Whether the directors of a bank be called agents, trustees, or quasi trustees is of little importance. Whatever their designation, their relation to the bank and to all of its stockholders, both minority and majority is fiduciary in character and one of confidence and trust.

"It was the duty of the directors of the Marquette National Bank actively to protect and to preserve the property placed in their hands by the stockholders.

"In this case the managers of the business were either the agents or the trustees of the bank and its stockholders, and everything of value resulting from their services and efforts as such agents or trustees belonged, not to them individually, but to their principals or cestuis que trustent, the bank and its owners."

Kaufman v. Marquette Nat. Bank, 289 Fed. 299.

The directors are the trustees for the stockholders and also for the corporation and the corporation itself is the agent and trustee of its stockholders and it cannot be denied that it is the right of every one to see that his property is well managed. The stockholders are the

owners of the assets and have an interest in the assets and business and a right to be informed of the financial condition and of the property itself.

Guthrie v. Harkness, 199 U. S. 154, pages 154 and 155, 50 L. Ed. 132.

The corporation is nothing but the hand or tool of the stockholders, in which they hold its property for their benefit. They are the equitable and beneficial owners and holders of all its property and the corporation is the mere holder and manager of it for them.

The position that a stockholder in a corporation has no interest in the enhanced value of its property, or in its undivided income, profits and surplus is untenable and may not prevail.

Lynch v. Turrish, (C. C. A. 8th C.) 236 Fed. 656.

"Sec. 4119. CORPORATION MAY SUE ITS DIRECTORS, either at LAW OR IN EQUITY.—It is scarcely necessary to suggest that a suit for the purpose of setting aside transactions of the directors or their governing body, in fraud of the rights of the corporation, may be brought by the corporation itself. There is no possible doubt, either in England or in this country, of the right of a corporation to maintain such an action. Indeed, actions at law are constantly maintained by corporations against their unfaithful directors, where the facts are appropriate for redress at law; *and in equity the question most frequently arises is, not whether the corporation may bring such an action*, but whether it is not the only party which can bring it. Where the

ground of action is misfeasance or culpable negligence, the corporation, not the stockholders, is a proper party plaintiff,—though, under some remedial systems, the stockholders, and often a creditor, may maintain an action at law; and *where the corporation is still under the control of the unfaithful directors, so that redress of the grievance cannot be had by an action in its name, a stockholder may maintain a proceeding in equity, suing for himself and all other stockholders, to protect the rights of the corporation, as trustee for its stockholders and creditors.* Actions brought by stockholders under this theory involve the rights of minority stockholders, as well as the rights of the corporation; and the questions arising in such actions are so numerous and complicated that it has been thought best to deal with them in a separate title.

(*Ryan v. Leavenworth, etc. R. Co.*, 21 Kan. 365; *Denny v. Manhattan Co.*, 2 Denio (N. Y.) 115; *Cross v. Sackett*, 16 How. Pr. (N. Y.) 62.)

(*Simons v. Volcan Oil & Mining Co.*, 61 Pa. St., 202; s. c. 100 Am. Dec. 628; *Branch Bank v. Collins*, 7 Ala. 95; *Franklin Fire Ins. Co. v. Jenkins*, 3 Wend. (N. Y.) 130.

(Post, Sec. 4471, et seq.)"

3 Thomp. Corp Sec. 4119, p. 3017.

"* * * The author conceives the rule to be capable of a wider statement, thus: If the directors of a corporation are guilty of a breach of trust, injurious to the corporate property, or to the rights of the shareholders, or a portion of them, and if the corporation refuses to institute the proper proceeding to restrain, or redress such injury, one or more of the share-

holders may do it in their individual names. This definition, it is perceived, extends the right of action to the redress of breaches of trust injurious to PARTICULAR SHAREHOLDERS, as well as those which are injurious to the corporation, that is, to ALL THE SHAREHOLDERS. IT PROCEEDS UPON THE THEORY THAT THE DIRECTORS ARE NOT ONLY TRUSTEES FOR ALL THE SHAREHOLDERS, BUT IN A LIMITED SENSE, FOR EACH OF THEM. For while it is the law that wrongs by directors are more properly redressed by a suit in the name of the corporation, and while in technical and artificial theory, the directors are primarily the TRUSTEES OF THE CORPORATION.—yet, as in point of substance and sense, the corporation consists of the aggregate body of its shareholders, it is obvious that, in the most substantial sense, the directors are TRUSTEES FOR THE SHAREHOLDERS, and that in any action to redress breaches of trust on the part of the directors, the SHAREHOLDERS ARE THE REAL PARTIES IN INTEREST."

4 Thompson on Corporations, Section 4479, Page 3306-7.

"The question rather is whether they were guilty of neglect in not knowing or ascertaining these things and in not taking steps to prevent or remedy them—such culpable neglect as would make them liable under the general principles of the common law governing the duties of the bank directors which apply to national banks as well as all other banks."

Rankin v. Cooper et al. (C. C., W. D. Ark. E. D.) 149 Fed. 1012.

"If, upon the other hand, directors know, or by the exercise of ordinary care, should have known, any facts which would awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible."

Rankin v. Cooper et al. (C. C., W. D. Ark. E. D.) 149 Fed. 1013.

"It seems to me, however, that the only effect that should be given to the by-law is to treat it as a piece of evidence in the nature of an admission on the part of the directors as to what they regarded they were called upon to do in the performance of their duties in examining the bank. If the directors were not chargeable with knowledge of what the by-law called for, it seems to me that the fair inference is that they knew what it called for, inasmuch as they understood they were to make examinations twice a year. Under the by-law, they were required:

"To examine into the affairs of the bank, to count its cash, and compare its assets and liabilities with the balances on the general ledger, for the purpose of ascertaining whether or not the books are correctly kept, and the condition of the bank in a sound and solvent condition."

And, irrespective of the by-law, I find that due care on their part required them, in examining the bank, *to compare the liabilities, as they appeared on the depositors' ledger at the time the examinations were made, with the cashier's ledger.* The master finds, and the finding is not questioned, that they never looked at the depositors' ledger, which was the

book upon which the chief liability of the bank was kept, and consequently never compared the liability as there shown with the balance due depositors on the cashier's ledger for the purpose of ascertaining whether or not the books were correctly kept."

Bates v. Dresser, et al. (D. C., D. Mass.) 229 Fed. 787.

"The ground upon which these cases seem to proceed is that the directors of a national bank, in entering upon their duties as such officers, impliedly agree to properly and faithfully perform them, and if by misconduct or negligence they fail in this respect, and damage ensues, a cause of action arises which the receiver may enforce for the benefit of the stockholders and creditors: that the cause of action is ex contractu, rather than ex delicto, and, because of this, survives.

This is apparently the ground upon which a like conclusion was reached in the following cases, although in them **IT WAS SAID THAT A "FIDUCIARY RELATION" EXISTS BETWEEN THE CORPORATION AND ITS DIRECTORS, AND THAT FOR A FAILURE TO PERFORM DUTIES ARISING OUT OF SUCH RELATION** the remedy will survive; it being regarded as an exception to the maxim "Actio personalis moritur cum persona." *Charitable Corporation v. Sutton*, 2 Atk. 400; *Concha v. Murrieta*, 40 Ch. D. 443; *Warren v. Para Shoe Co.*, 166 Mass. 97, 104, 44 N. E. 112."

Bates v. Dresser, et al. (D. C., D. Mass. 229 Fed. 798.

"There was thus sufficient evidence from these directors, themselves that they were

scrutinizing the affairs of the bank; that prior

to the published official report of September 30, 1892, which was followed by the published official report of December 9, 1892, these directors were examining the condition of the bank, that they were considering the losses sustained, the expenses incurred, and the basis of the dividend declared in July. THESE WERE NOT CASUAL STATEMENTS, BUT DELIBERATE ASSERTIONS OF ACIVITY OF SUPERVISION IN RESPONE TO OFFICIAL COMPLAINT. IT WAS PLAINLY PERMISSIBLE, DESPITE THEIR DISCLAIMERS AND DENIALS, to attribute to these directors the knowledge which men of ordinary intelligence would readily have obtained with respect to the financial condition of the bank in the course of the supervision which they professed to be actively exercising. Assuming that they were ignorant of the frauds that had been committed and concealed by falsified entries, there was warrant for the conclusion that they could not have failed to acquire sufficient information to be aware that the representations in the official reports of the latter part of the year 1892 were materially false and calculated to deceive."

Jones National Bank v. Yates, 240 U. S. 562-563; 60 L. Ed. 801-2.

"There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine. And such was the conduct of plaintiffs in error in this case. They had notice from the Comptroller of the Currency that $194,000 *of the items counted as assets of the bank were doubtful and should be collected or charged*

off. This 'was a direct warning to them,' as the trial court said, 'by the bank examiner and Comptroller, that assets to nearly twice the amount of the capital stock were considered doubtful.' They, notwithstanding, represented the assets to be good. Such disregard of the direction of the officers appointed by the law to examine the affairs of the bank is a violation of the law. Their directions must be observed. Their function and authority cannot be preserved otherwise and be exercised to save the banks from disaster and the public who deal with them and support them from deception."

Thomas v. Taylor, 224 U. S. 82, 56 L. Ed. 678.

"Under what is said to be the universal practice of national banks in making such reports, and under what the undisputed testimony shows to have been the regular practice in this bank, the making and publishing of the reports were the automatic results of the bookkeeping. Whatever the books and daily statements showed the resources to be appeared as resources on the report. If a line of paper was carried at its face among the 'loans and discounts' on the books, it would normally appear at that same amount in every one of the five reports in each year. Both defendants knew this. It follows that it is not important whether each did or did not attest each report (except so far as plaintiff's conclusion to buy might rest on the presence of a particular name at the foot of the report plaintiff saw). All directors who participate in and approve a long-continued carrying on the books, among the loans and discounts, of a line which they

know is worthless, and in amount sufficient materially to affect the standing of the bank, are bound to know that under the practice prevailing in this bank such worthless paper will become an element of the published reports, and that these reports will in so far falsely represent to the public the bank's condition; and so, in a fair sense, such director permits the making of a report which is a violation of the act."

* * *

"Speaking as we are of that duty to unknown persons among the public, the breach of which will support this action, we cannot make a more accurate formulation than to say that the duty to charge off arises when, and so far as, the directors know they are carrying uncollectible paper beyond that reasonable amount and beyond that reasonable time permitted by an honest exercise of their official discretion. ***In other words, it arises when they know that longer carrying will, through the medium of regular reports or otherwise, normally result in substantially misleading the public as to the net value of the bank's assets.***"

Chesbrough v. Woodworth, 195 Fed. 881 and 882.

Jones National Bank v. Yates, 240 U. S. pp. 559 and 560, and at page 562.

Robinson v. Hall, 63 Fed. 226 and 227.

The knowledge of the president was the knowledge of the bank.

Martin v. Webb, 110 U. S. 7;

Manhattan Bank v. Walker, 130 U. S. 267, at p. 280, 32 L. Ed. 963;

Wasson v. Hawkins, 59 Fed. 234.

"IN THE CASE OF BANKERS WHERE GREATER CONFIDENCE IS ASKED AND REPOSED AND WHERE DISHONEST DEALINGS MAY CAUSE WIDE SPREAD DISASTER A MORE RIGID RESPONSIBILITY FOR GOOD FAITH AND HONEST DEALING WILL BE ENFORCED THAN IN THE CASE OF MERCHANTS AND OTHER TRADERS."

St. Louis & San Francisco R. R. v. Johnston, 133 U. S. 566, at p. 576, 33 L. Ed. 686;

Cragie v. Hadley, 99 N. Y. 131.

Mr. F. Lee Major, former assistant bank commissioner of the state of Arkansas, published and put out (The MacMillan Company, 1925) a book, standardized in its application, entitled "The Duties, Responsibilities and Liabilities of Bank Directors," and to save and lighten the labors of this Court, there here follows quotations of the law gathered and compiled, thus by Mr. Major, on these matters as applied to the facts of this record:

Mr. Justice Harlan (*Briggs v. Spaulding,* 141 U. S. 168).

"We (Harlan, Gray, Brewer, Brown) are of the opinion that when the act of Congress declared that the affairs of a national banking association shall be 'managed' by its directors, and that the directors should take an oath to 'diligently and honestly administer' them, it was not intended that they should abdicate their functions and leave its management and the administration of its affairs entirely to executive officers. True, the bank may act by

'duly authorized officers or agents,' in respect to matters of current business and detail that may be properly intrusted to them by the directors. But, certainly, Congress never contemplated that the duty of directors to manage and administer the affairs of a national bank should be in abeyance altogether during any period that particular officers and agents of the association are authorized or permitted by the directors to have full control of its affairs. If the directors of a national bank choose to invest its officers or agents with such control, what the latter do may bind the bank as between it and those dealing with such officers and agents. But the duty remains, as between the directors and those who are interested in the bank, to exercise proper diligence and supervision in respect to what may be done by its officers and agents.

"As to the degree of diligence and the extent of supervision to be exercised by the directors, there can be no room for doubt under the authorities. It is such diligence and supervision as the situation and the nature of the business requires. Their duty is to watch over and guard the interests committed to them. In fidelity to their oaths, and to the obligations they assume, they must do all that reasonably prudent and careful men ought to do for the protection of the interests of others intrusted to their charge." (See pages 99 and 100.)

(*Society v. Underwood*, 9 Bush (Ky.) 609.)

"Bank directors are not mere agents, like cashiers, tellers and clerks. They are trustees for the stockholders; and as to their dealing with the bank, they not only act for it and in

its name, but, in a qualified sense, are the bank itself. It is the duty of the board to exercise a general supervision over the affairs of the bank, and to direct and control the action of its subordinate officers in all important transactions. (p. 100.)

"Directors, by assuming office, agree to give as much of their time and attention to the duties assumed as the proper care of the interests intrusted to them may require. If they are negligent, and losses result from acts committed by those left in control, the directors are responsible to the institution.

"It is the duty of a director to know his bank, and to see that its affairs are honestly and properly managed. He cannot shirk this duty and avoid liability." (page 101.)

Bowerman v. Hamner, supra.

"By accepting the position they (directors) assume capacity to manage the business; impliedly undertake to use diligence and care in perfomance of their duties; must give the enterprise the benefit of their best care and judgment; are bound to manage the bank as carefull as their own business; the fact that they serve without pay does not permit a less degree of activity; must be diligent and careful in their duties, and imprudence and negligence cannot be excused on grounds of ignorance or inexperience." (page 101.)

Mr. Justice Harlan (*Briggs v. Spaulding*, 141 U. S. 174).

"They (directors) ought not, by accepting and holding the position of directors, to give assurance to stockholders and depositors,

whose interests have been committed by their control, that the bank is being safely and honestly managed, without doing what prudent men of business recognize as essential to make such an assurance of value. A banking corporation, publicly avowing that its business was to be wholly administered by executive officers, and that the directors would have nothing in fact to do with its management, would not long retain the confidence of stockholders and depositors, a fact which, of itself, shows that the abdication by directors of their duties and functions not only tends to defeat the object of the creation of such an institution, but puts in peril the interest of the stockholders and depositors." (Major on "The Duties, etc.," page 102.)

"The fact that directors must commit details of business to executives and inferior officers does not absolve them from maintaining reasonable supervision. If such officers waste the bank's assets the directors cannot escape liability on the ground that they did not know of such waste, when it is made to appear that their ignorance was a result of a want of that care which ordinary prudent, diligent men exercise in business." (Major, etc., p. 106.)

(*Scale v. Baker*, 70 Tex. 292)

"If Bank Directors do not manage the affairs and business of the bank according to the directions of the charter and in good faith, they will be liable to make good all losses which their misconduct may inflict upon either stockholders or creditors or both." (Major, etc., p. 106.)

(*Chesborough v. Woodward*, 195 Fed. R. 881.)

"All Directors who participate in and approve a long continued carrying on the books of a bank among the loans and discounts of a line which they know is worthless and in amount sufficient materially to affect the standing of the bank, are bound to know that under the practice prevailing in such bank, such worthless paper will become an element of its published reports, and these reports will in so far falsely represent to the public the bank's condition; and so in a fair sense such Director permits the making of a report which is false; hence his primary duty is to charge off assets which have become worthless." (page 107.)

(*Chesborough v. Woodward*, 195 Fed. R. 881)

"The duty to charge off worthless assets rests on the Board of Directors as an entity. But when this duty is wholly unperformed by the Board, an individual Director, who was engaged jointly in the performance of his functions, may nevertheless be individually liable because of his participation in the failure to charge off such worthless assets, whether or not such assets have entered into and become a part of the published statement of such bank." (page 107.)

(*Chesborough v. Woodruff*, 195 Fed. 876; 116 C. C. A. 465.)

"Let it be conceded that the inattention of a director situated as was Bowerman has been brought about without any evil intention on his part, and that it may therefore work some hardship to hold him liable for the losses due directly to the positive negligence of the president and the loan committee. But there is the other and wider view to be taken, that by which the law must always guard the interests

of the institution and those of the public who were attracted to it . . . the interest of persons who have given their moneys to the custody of the bank, relying upon the belief that the directors, being men of integrity and business capacity, would at least make some effort to see that those in charge of the affairs of the institution would keep within the statutes and the by-laws which control. In the application of this wholesome doctrine one who fails to make any effort to have the bank properly administered acts wrongfully and becomes liable for non-action." (pages 107 and 108.)

"Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of the dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known." (page 113.)

"Directors of a bank are bound to use diligence in acquiring knowledge of its business; they cannot be heard, when sued, to say that they were not apprized of facts the existence of which is shown by the books, accounts and correspondence of the bank." (19 Kan. 60) (Major, page 114.)

"This court said by Mr. Justice Harlan, in *Martin v. Webb*, 110 U. S. 15 (28:52) "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on

around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than from time to time to elect the officers of the bank and to make declaration of dividends. That which they ought by proper diligence to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." (*Auten v. United States National Bank of New York*, 174 U. S. 148).

Auten v. U. S. National Bank, 174 U. S. 148.

The Circuit Court of Appeals for the Fourth Circuit, November 15, 1928, in *Gamble v. Brown*, 29 Fed. (2d) 366, page 371, dealt with a situation such as we have here, as follows:

"It is contended by the defendants, however, that even if the examining committee had functioned, it could not have discovered the embezzlement of the notes by Dean. It is pointed out that K. B. Cecil, a bank examiner and expert accountant, made examinations of the bank in 1914 and failed to discover the shortage until his third visit. The bank examiner made three examinations—on February 19, August 7, and August 22, respectively. The shortage of notes was discovered as the result of the examination of August 7. Certain notes, which should have formed part of the assets of the bank, were represented by

memoranda indicating that they were in the hands of other banks for collection. Between August 7 and August 22, the examiner communicated with these banks and discovered that notes aggregating approximately $17,000 which were supposed to be in their hands, were not so held. Hence he returned on August 22 and closed the bank. A similar check was made by the examiner on February 10, but no shortage was discovered. But it was possible for Dean at that time to have substituted in the note case, without detection, other worthless notes of the Farmers' Loan & Trust Company which he then had on hand. Such a substitution, however, could not have been made later on, when the notes would have matured. *An auditing committee of the bank in the ordinary course would have checked the memoranda of notes in other banks for collection, precisely as did the examiner.* The directors were culpable in this respect, and are liable *to the bank for the losses which their neglect made possible.* We think that the following comment of the special master was justified by the evidence:

"It cannot be urged that the fraud alleged to have been committed by H. H. Dean was so ingeniously devised and concealed *that same would have escaped detection had the directors been more vigilant,* or had proper audits been made of the bank's affairs. The proof shows that the directors were not vigilant, or even careful, and that audits were not made. Had the directors prudently and carefully performed their duties, it is fair to presume either that Dean would not have attempted his dishonest practices, or that they would have been detected. *The directors' indifference opened the way and Dean stepped into it.*"

The Circuit Court of Appeals for the Sixth Circuit, January 15, 1929, in *Robinson v. United States,* 30 Fed. (2d) 25, at page 27 in a case where it was alleged funds of the bank had been misapplied, said:

> "The statute requires, not only that Beauchamp should have misapplied the fund of the bank, but that in so doing he should have intended to injure or defraud the bank. On this record the intent to defraud is as clear as the misapplication. By putting the transaction in a fictitious form, and thus, in effect, representing to the directors and to the bank that he was making this loan upon the security of pledged bales of cotton being then sold, when this was not true, he was deceiving the bank and necessarily defrauding it because of the deceit. When a bank officer misapplies the money of the bank, intends the misapplication, and for that purpose gets the money out of the bank by any kind of a false pretense, the inference of intent to injure or defraud, in the statutory sense, cannot be avoided. *Galbreath v. U. S.* (C. C. A. 6) 257 F. 648, 656."

> "While the cited cases hold that, in a suit for damages against national bank directors, based solely upon a violation of duty imposed by the National Bank Act, it is not enough to show a negligent violation of the act, but that something more, in effect an intentional violation, must be shown to justify a recovery, and that this is the exclusive rule for measuring the responsibility of directors as to such violations, *yet, it is expressly pointed out in the opinion of the court, that the act does not relieve such director from the common law*

duty to be honest and diligent, as is shown by the oath which they are required to take "to diligently and honestly administer the affairs of the association" as well as not "to knowingly violate or willingly permit the violation of any of the provisions of this title," the National Bank Act.

Bowerman v. Hamner, 250 U. S. 510.

The rule thus announced would perhaps be applicable if the bill were limited to the charge of liability based upon the statutory prohibition of excessive loans, for it is reasonably clear that Bowerman did not have actual knowledge of the making of the loans or of anything else connected with the conduct of the bank. ***He deliberately avoided acquiring knowledge of its affairs and wholly abdicated the duty of supervision and control which rested upon him as a director.***

Bowerman v. Hamner, 250 U. S. 510-11.

The National Bank Act imposes various specific duties on directors other than those imposed by the common law, and it is obviously possible that a director may neglect one or more of the former and not any of the latter, or vice versa. For example, in this case we have the gross negligence of the appellant, in failing to discharge his common law duty to diligently administer the affairs of the bank, made the basis for the contention that he did not "knowingly" violate his statutory duty by permitting the excessive loans to be made. While the statute furnishes the exclusive rule for determining whether its provisions have been violated or not, ***this does not prevent the application of the common-law rule for measur-***

ing violations of common-law duties. And there is no sound reason why a bill may not be so framed that, if the evidence fails to establish statutory negligence, but establishes common-law negligence, a decree may be entered accordingly, and thus the necessity for a resort to a second suit avoided.

Bowerman v. Hamner, 250 U. S. 511.

Sometimes the bank, as it did in this case, issues stock for an amount more than par value, in such case allowance must be made for the consequent unearned increase of surplus. (Guthman, Analysis Financial Statements, 1925, at page 362.)

And we find when it did this Spaulding says in his pleading nearly $400,000 went immediately to pay losses, yet the bank was making good statements from September 15, 1922 down to and inclusive of the 28th of March, 1927. *They knew*, they knew; but the stockholders and public did not know until afterwards.

It is laid down as a principle in Robert H. Montgomery's recent treatise, 1925, "On Banks and Their Uses," (Ronald), sec. 23 at page 1205:

> "The proportion that exists between the worth and the debts shows quite clearly the balance between the source and the ownership of the funds being used in the affairs of the business. AS THE PROPORTIONS OF DEBT INCREASE OVER THE FUNDS INVESTED BY THE STOCKHOLDERS, THE INSTITU-

TION BECOMES MORE DEPENDENT FOR WORKING CAPITAL UPON THE DECISIONS OF ITS CREDITORS, AND MORE SUSCEPTIBLE TO THE STRAINS AND PRESSURE OF CRISIS."

The testimony of Mr. Ainsworth, Mr. Dick and Mr. Fraley, coupled with the Examiners' statements of Wilde and Harris disclose precisely that this bank thus became immediately susceptible to this very strain and crisis. Observable and known to everyone as early as 1925; besides cautioned as they were and reprimanded by the Comptroller. THESE DIRECTORS REPLY THEY WOULD ATTEND TO THESE REQUESTS.

The growth of deposits is perhaps the most remarkable feature and is indicative of the aggressive business building policy, which characterized the growth of this bank. (Guthmann, Analysis of Financial Statements, 1925, at page 364.)

Yet building up such condition upon a substruction of inherent weakness was the reason, Stewart gave "FOR HANGING THE CONSEQUENCE UPON SOMEONE ELSE." They were as directors apprehensive; but when told to do they did not.

When cautioned; they remained stationary.

When reprimanded; they promised action, but did not act.

When March came in 1927 with fifteen to eighteen million deposits as Price says all were apprehensive that much, that the directors must do as they then did or be liable to depositors for want of funds to meet demands to pay. No stockholder was so informed except the inside circle with the expressed hope that some one would work them out, or they could sell out.

The best test of a bank's progress is to trace the change in the book value of its shares of stock from period to period. (Guthman, Analysis of Financial Statements, 1925, at page 363.)

So, naturally, on terms suggested in 1923, Ainsworth would not deal; on terms first suggested in 1927, Ainsworth would not deal—Why? because upon being told the bank's INSIDE CONDITION his banking sense told him the foreshadowed results.

So, naturally, on terms suggested in 1927 to Corbett, Adams, Wyld, et al, and the disclosures by Jones, Stewart, Price of the examiners' reports, and the contents of the note pouch, and all inside facts, there was no deal for the First National Bank.

But, what was then done, Price, Ainsworth says, took bonds to him, equivalent to the cash purchase price by the Pittock trustees and their associate directors of the Wheeler checks held by the bank

and Mark Skinner as agent was allowed to carry a Cashier's Check of the bank as agent for said Pittock Trustees, Morden and Price, in the sum of $922,100 around with him and also receive a note TWENTY SOME DAYS AFTERWARDS for one million dollars by the same bank, aside and beyond what the associated directors signed for to the purchasing banks.

There is no doubt in this case as shown by the evidence, that a burden was put upon the stockholders over and beyond that which was assumed by them by the mere relation of being a stockholder, in the nature of the transaction as it was carried out, and the Circuit Court of Appeals, Ninth Circuit so held in *Chase v. Hall*, January 14, 1929, 30 Fed. (2d) 195, page 197, wherein it was said

> "The appellants contend that they are not liable for the assessment for the reason that the debt in the instant case was not incurred in the ordinary course of business or in the ordinary course of liquidation. We cannot agree that the execution of the note was out of the ordinary course of liquidation. It has been held that when a national bank assumes the debts of an insolvent bank in consideration of a transfer of a portion of its assets and a note for the balance, the note represents the contracts, debts, and engagements of the insolvent bank for which its stockholders are responsible. *Wyman v. Wallace*, 201 U. S. 230, 26 S. Ct. 495, 50 L. Ed. 738; *Hulse v. Argetsinger* (D. C.) 12 F. (2d) 933."

"It is not within the power of the officers of the bank, without express authority, by such means to prolong indefinitely an obligation on the part of the shareholders, which is imposed by the statute only as a means of securing the payment of debts by an insolvent bank when it is no longer able to continue business, and for the purpose of effectually winding up its affairs.

Richmond v. Irons, 121 U. S. 66, 30 L. Ed. 875.

Looking at the record when these suits were brought the relation of complainants to the bank and its directors and between them and each of the complainants the law required an accounting; and the authorities on this branch of the case are submitted as follows:

"The rule is universal that courts of equity have jurisdiction to settle accounts whenever a fiduciary relation exists between the parties and the duty to render an account to one of the parties rests upon the other. *Davis v. Hofer*, 38 Or. 153 (63 Pac. 56); 1 Cyc. 427; *Warren v. Holbrook*, 95 Mich. 185 (54 N. W. 712 35 Am. St. Rep. 554); 1 R. C. L. 222; 1 Ency. Pl. & Pr. 96; *Fowle v. Lawrason*, 30 U. S. (5 Pet.) 503 (8 L. Ed. 204.)

1 Ency. Pl. & Pr. 96, Says:

"It may be said generally that whenever there is a fiduciary relation, such as that of trustee, agent, executor, etc., the right to an accounting in equity is undoubted.'

In *Fowle v. Lawrason,* 30 U. S. (5 Pet.) 503 (8 L. Ed. 204), Chief Justice Marshall says, inter alia:

> "In all cases in which an action of account would be proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted. It is the appropriate tribunal."

In *Davis v. Hofer,* 38 Or. 153 (63 Pac. 56), the court says:

> "The rule is of universal application that a court of equity has jurisdiction to settle an account wherever a fiduciary relation exists between the parties upon whom the duty of keeping accounts rests."

In *Warren v. Holbrook,* 95 Mich. 185 (54 N. W. 712, 35 Am. St. Rep. 554), the syllabus in part is:

> "Where defendant, a bartender, is required to keep an accurate account of all money received, and pay it over to plaintiff, his employer, he occupies a fiduciary relation; and when he has been guilty of a breach of trust, in appropriating funds to his own use, the plaintiff may proceed in equity for an accounting."

1 Cyc. 427, 428, says:

> "Courts of equity have jurisdiction over all trusts for the purpose of compelling an accounting, and the existence of any confidential or fiduciary relation is sufficient to invoke such jurisdiction, whenever the duty arising out of such relation rests upon one of the

parties to render an account to the other. This embraces not only the supervisory power of such courts over trust estates generally, but over acts amounting to breach of trust and fraudulent conduct on the part of persons occupying relations of confidence. In such cases, it is not necessary that the accounts should be mutual, or that the bill should be framed for discovery. And it is no objection that an action at law sounding in damages may be brought for the breach; the legal and equitable remedies are concurrent, and the complainant has his election."

A person is said to act or to receive money or contract a debt in a fiduciary capacity when the business which he transacts or the money or property which he handles is not his own or for his own benefit, but for the benefit of another person to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other. The term is not restricted to technical or express trusts, but includes such offices or relations as those of attorney at law, guardian, executor, broker, agent, a director of a corporation, etc. Black's Law Dictionary (2 ed.), 496."

Templeton v. Bockler, (144 Pac. 405) 73 Or. 494, p. 507-8-9.

"Equity will assume jurisdiction where there exists a fiduciary relationship between the parties, as in favor of beneficiaries against trustees, including actions against directors of corporations."

Eaton on Equity, page 518.

(See *Phez v. Salem Fruit Union*, 103 Or. top of p. 536).

It is respectfully submitted, therefore, in conclusion, that where before the same trial court the criminal case was tried resulting in the conviction of the president of this bank and J. E. Wheeler upon evidence relating to this same *"float"* as the major premise of that case, much less in quantum and much weaker in strength than the evidence and details in this civil case, and yet, that in this civil case the same trial court on stronger evidence and greater quantum of proof dismisses the bills of complaint, there was error prejudicial to the complainants as herein pointed out. Moreover, the situation is incongruous and inconsistent with the law. There was brought home to the president whom the law says *"his knowledge is the knowledge of the bank"* all of these matters; and he called attention as he swears of Skinner, Price and his other officers and directors thereto. There was every means, to ascertain, and to know, as pointed out in the foregoing facts and law, what the situation actually was; and the conclusion seems inescapable that liability as alleged by the complainants was proved to attach.

Respectfully submitted,

William C. Bristol,
Attorney for Appellants.

August 8, 1929.

No. 5874

IN THE

United States Circuit Court of Appeals

IN AND FOR THE NINTH JUDICIAL CIRCUIT
IN EQUITY

CHARLES A. BURCKHARDT,
vs.
NORTHWESTERN NATIONAL BANK, et al.,
Respondents.

FRED A. BALLIN,
Appellant,
vs.
THE NORTHWESTERN NATIONAL BANK, et al.,
Respondents.

Brief of Respondents

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STATEMENT OF THE CASE

A statement of the case is deemed necessary by respondents for the reason that the statement made by appellants is not understandable. The case is made by the pleadings, of which no mention is made by appellants, and of which a synopsis is necessary to clarity of approach.

Northwestern National Bank of Portland (Oregon) being in liquidation at the time these suits were instituted, was demanding payment of certain obligations due it from appellants, who, as well as being debtors were stockholders of the bank. In part at least to prevent the collection of their indebtedness the appellants instituted these suits against the bank, its directors, and a former director, in which suits certain charges were made and certain relief prayed for.

The bills of complaint are replete with innuendo, but we believe it to be fair to say that the actual charges contained therein are the following and no others:

1. That between July 2, 1922, and December 31, 1926, the defendant directors knowingly and willfully caused to be lost to the bank $2,315,000.00, an aggregate sum composed of sixteen items separately enumerated in the complaint.

2. That in violation of the mandate of the National Bank Examiner that certain loans grouped under the generic designation of the "Wheeler lines" be reduced, the directors knowingly and willfully caused said loans to be lost to the bank.

3. That in violation of the National Banking Act the directors caused to be loaned to J. E. Wheeler $634,000.00, being an excess over thirty per cent of the capital of the association and consequently a loan prohibited by statute.

4. That in 1927 the defendant directors "allowed and permitted" the bank to get into financial difficulties and involve the stockholders in loss by arranging with the United States National Bank and the First National Bank (both of Portland) for these institutions to take over the assets of the Northwestern National Bank, assume its deposit liabilities, and for the latter to discontinue the banking business.

These charges were categorically denied in the several answers filed by the defendant directors, except the defendant, Olmstead, who is not represented by the

counsel making a joint appearance for all of the other defendants. It will be shown that the evidence failed to establish the charges made in the bills of complaint.

With respect to the first of these charges, it was established by the evidence that the loans under criticism were intelligently and carefully made, and that in so far as losses resulted therefrom, such losses are attributable to lessened financial responsibility of the borrowers over which the directors had no control, rather than to derelictions of duty on the part of the directors in the attempted collection of the debts.

With respect to the second charge, the evidence establishes the fact that the loans made to the "Wheeler lines" were justified by proper banking practice, were adequately secured, and were to a large degree, if not entirely, actually collected.

With respect to the third charge that loans in excess of the statutory limit were made, there could not be and was no evidence offered in support.

With respect to the fourth charge relating to the financial difficulties in which the bank became involved, growing out of which came the transfer of its assets to and the assumption of its deposit liabilities by the United States National Bank and the First National Bank, it was established by the evidence that none of the directors except Olmstead had knowledge of any acute or dangerous condition in the affairs of the bank until February, 1927. That forthwith upon such knowledge being acquired immediate action was taken to correct the situation by the directors making immediately

available for use by the bank funds sufficient in amount to place it in the strongest financial condition in which it had been for years, under conditions which insured such funds later becoming permanently incorporated into the capital of the bank. That in spite of this action on the part of the directors rumors involving the soundness of the institution became current in the community, the effect of which rumors the directors, in spite of aggressive efforts on their part, were unable to counteract. That a run was precipitated upon the institution which necessitated transfer of its assets to the United States National Bank and the First National Bank under conditions creditable to the wisdom, the courage and the sense of responsibility of the directors instead of in any respect discreditable to them. Such method of liquidation avoided both loss and delay on the part of the depositors of the bank in receiving their money. It avoided loss to the stockholders of the bank, which would have necessarily resulted had the directors failed to act and permitted an involuntary liquidation of the bank to terminate the run.

Based upon the charges contained in their bills the appellants asked for an injunction against the bank proceeding with the collection of the indebtedness of the appellants to it. They asked for an accounting with respect to all financial transactions of the bank (presumably from the time of its organization to and through its liquidation) to the end that there might be reimbursement to the appellants for the losses sustained by them through the impairment of value of their stock arising from the liquidation of the bank.

The relief sought was denied by the learned trial judge through the application of those legal principles which have been so frequently stated by the courts as to have been crystallized into clear and definite rules of law. These principles were applied by the trial judge during the three weeks trial, which, at the behest of counsel for appellants, went far afield. They were succinctly stated in the opinion of the trial judge, which preceded the decrees dismissing the bills for lack of equity. They will be discussed hereinafter in connection with such answer to the specifications of error as it is deemed necessary to make.

Except for the strictly legal question presented by the first specification of error, based upon the refusal of the court to entertain jurisdiction of the cause as to the director Chauncey McCormick, all of the specifications of error, two to seven, are general in terms and present but the single question of alleged error resulting from the dismissal of the bills. To an understanding of the case there is essential a knowledge of the history of the institution, its spectacular rise, its somewhat troubled existence during the last years of its life, and its more spectacular fall. This history can be gleaned from the statement of evidence, and in succinct form we shall attempt to present it.

The bank was organized in 1912 with an original capital of $500,000.00 and a surplus of $100,000.00, which capital and surplus, by successive increases, the last of which took place in July, 1922, became capital of $2,000,000.00 and surplus of $400,000.00. (R. 10, 71.)

With its original capital of $500,000.00 and surplus of $100,000.00 the bank began business on January 2, 1913. (R. 10.) The first president of the bank was Henry L. Pittock, who during his lifetime was one of the largest stockholders and whose estate after his death continued to be one of its largest stockholders. (R. 428.) Mr. Pittock died in 1919. After his death, Emory Olmstead became the president of the bank and continued as its active executive head (R. 492) until his resignation on the 28th day of February, 1927, when he was succeeded in office by O. L. Price. (R. 4.)

The institution was conspicuously successful during the early years of its life. There were two years during its history when it grew more rapidly than any bank in the United States. In 1915 it had deposits of approximately $5,000,000.00. Within two years thereafter these deposits had practically doubled, and by 1920 its deposits had increased to $28,000,000.00. (R. 710.) Its earnings were large. It was paying dividends which it continued to pay until 1920, but it was this very period of extremely rapid growth which was responsible for loans being made out of which there later grew enormous losses. Indeed losses suffered by the Northwestern, growing out of loans made *subsequent* to 1920, were negligible, amounting to not more than $100,000.00. (R. 599.)

In 1920 the deflation period began. This was general throughout the United States, and its effect upon the national banks of the United States is set forth in the annual report of the Comptroller for the year 1921, from which we quote as follows:

"The year has been one of the most trying through which banking institutions have passed in a long period. Following an experience of inflation which, considering its world-wide extent, was perhaps without parallel, the banks in the past year have been under the necessity of facing the reaction in the form of progressive deflation. * * *

It was inevitable that the period of deflation which followed the war's expansion of credits should be intense, and quite in proportion to the extent of the inflation. * * *

The deflation in prices in the last year and a half has tested the solvency of every bank in the land, presenting acute conditions which required the most skillful handling."

But the situation which existed generally in Oregon and throughout the United States was peculiarly acute in the Northwestern National Bank. As its increase in deposits had been more than normally rapid so did its recession in deposits become more than normally heavy. From the peak of deposits in 1920 of $28,000,000.00 within two years the deposits dropped to $16,000,000.00. (R. 710.) In 1920 the loans of the bank were $19,-000.000. To pay the depositors who withdrew $12,-000,000.00 during the two year period following 1920, loans had to be collected where it was possible to effect speedy collection, with the result that the finest and best notes that were in the note pouch of the bank were called and the slow loans which could not be speedily collected accumulated. (R. 711.) The bank found itself with a frozen loan account of the proportion that

might be expected in a bank with $28,000,000.00 in deposits, but with deposits of $16,000,000.00 only. Its earning capacity was limited by the amount of its deposits, and upon the $16,000,000.00 of deposits it was required to earn enough to absorb the losses that had been developed under unusual conditions in a bank almost twice as large. The resulting condition was a very serious one. (R. 711.)

This situation the directors met to the extent of their ability. They realized the situation to the fullest. It was repeatedly and forcibly called to their attention by the various letters of the Comptroller which followed the periodic examinations of the bank. The directors were regular in their attendance at the directors' meetings. The members of the Executive Committee were indefatigable in their efforts to meet the situation, and find a solution of the serious condition which confronted them, for the existence of which they were not responsible. (R. 494, 669, 711.) We find the Board meeting regularly and giving consideration to all loans that were giving trouble. We find the Executive Committee paying extremely close attention to these matters, meeting regularly every Tuesday, considering old loans as well as new loans and renewals, and devoting a great deal of time in their efforts to work out the problems of the bank not only at meetings but by dropping into the bank every day to see what could be done. (R. 669.) If mistakes were made, and they were not many, they were mistakes of judgment and not those of inattention. These directors make no claims to omniscience nor infallibility. It is not believed that they will be held re-

sponsible for falling below that degree of success which omniscience alone could produce, or be required to become involuntary guarantors of the solvency of all debtors of the bank.

Although the amount of loss incurred by the bank on loans made subsequent to the deflation period was small (R. 669) and although its earnings were substantial, running from $150,000.00 to $200,000.00 a year from 1920 on (R. 668) and although none of these earnings was paid in dividends after 1920 (R. 668) but all were used in writing off the paper which the bank examiner from time to time declined to permit the bank to continue to carry longer among its assets, the losses continued to accumulate. They accumulated to the extent that the earnings were inadequate in a short period to create the funds necessary to remove the bad, slow or doubtful paper from the bank as speedily as it was desired to remove it and the directors were thereupon confronted with the problem of devising some means by which these assets of dubious value could be removed from the bank and the resumption of dividends made possible.

The Treasury Department, through the reports of its examiners, was in close touch with the situation and cognizant of the efforts of the officers and directors to improve the situation. The examiner reported after his examination of July 11, 1924, "that both officers and directors appear to be doing everything possible to remedy conditions" (R. 360) and again after the examination of February 24, 1925, "that the management is working earnestly to improve the bank's condition"

(R. 373). But it was realized by all that something of a drastic and constructive nature must be done.

In 1925 the suggestion was made that a corporation be organized among the shareholders of the bank for the purpose of purchasing as much as possible of its non-income producing assets. (R. 381, 382.) This recommendation, which apparently originated with the National Bank Examiners, was approved by the Examining Committee and called to the consideration of the Board in its report of December 23, 1925. (R. 387.) Subsequent to an examination of the bank, conducted by Bank Examiner Wylde in March, 1926, the recommendation went further and the Department then urged that a company be organized with sufficient paid-in capital to take out of the bank all of the real estate then owned or then in contemplation of acquisition, and in addition all assets of questionable character. (R. 394.) This plan was discussed by the directors during March and April of 1926 and the conclusion reached that such company should be organized with sufficient capital to enable it to acquire from the bank all of its assets which had been criticised by the Department so that future criticisms could be avoided and the payment of dividends resumed. Indeed the plan had been fully developed and approved by the Board prior to the receipt from the Department of its letter of April 26, 1926, commenting upon the Wylde examination of April 6, 1926. (R. 671.) A committee consisting of Mr. Metschan, who was a member of the Examining Committee, Mr. Stewart, who was a vice-president of the bank actively concerned in the handling of its slow

and frozen assets (R. 707) and Mr. Price, who was a vice-president and chairman of the Board of Directors (R. 668) went to Washington in June, 1926, and discussed the matter with the Comptroller, who gave his tentative approval to the plan and stated that he would give his final consent thereto or state any objection thereto he might have after the next regular examination which was scheduled to take place in the fall of 1926. (R. 672.)

The plan as put before the Comptroller was to effect the organization of a corporation with paid-in capital of $750,000.00, which was to be procured by each stockholder of the bank subscribing $37.50 to the capital of the corporation proposed to be organized for each share of stock in the bank. With this capital it was proposed that the corporation purchase frozen or slow assets in the amount of $1,500,000.00, paying to the bank therefor $750,000,000 in cash and giving to the bank its bonds in the amount of $750,000.00, the payment of which bonds was to be secured by lien upon the entire million and a half of assets so to be acquired from the bank. (R. 673.) At this same conference consideration was also given to a suggestion of the Department that there be effected a change in the management of the bank (R. 393) but the conclusion was reached at this conference in Washington that it was not advisable to effect any change in the management of the bank, through the resignation of its president, Mr. Olmstead, until after the proposed liquidating company had been organized and the transfer of assets effected. (R. 673.) The Comptroller felt that Mr. Olmstead was the one

best equipped to explain the necessity for the organization of the liquidating company to the stockholders of the bank and induce them to join in the organization of the company. (R. 673.)

It was the understanding with the Comptroller that adoption of the final plan for organization of the liquidating company should be deferred until after the examination in the fall of 1926, but during the interim the directors and the officers of the bank were active in interviewing the stockholders of the bank and in enlisting their support of the proposed plan. (R. 673.)

Subsequent to the examination of September 21, 1926, which showed non-bankable assets of $2,766,-396.90, of which $490,468.74 were listed as doubtful, and $809,747.25 were listed as prospective losses (R. 401), Mr. T. E. Harris, the Chief National Bank Examiner who made the examination, recommended that new capital in the minimum amount of one million dollars should be provided for the purpose of eliminating sub-standard assets from the bank. This recommendation was approved by the Department in its letter of December 2, 1926 (R. 409) and the expectation was there expressed that action would be taken to comply with the examiner's recommendations. A personal conference was held in San Francisco in December of 1926 between the chairman of the Board and vice-president Stewart and the Comptroller of the Currency and Chief Examiner Harris, who had made the examination of September, 1926. (R. 673.) At this conference the whole situation was reviewed, the plan for a liquidating company was approved by the Comptroller, and Mr.

Price was advised that when it had been carried into effect the bank would be permitted to resume the payment of dividends. (R. 674.)

It cannot be doubted that had this plan been carried into effect the troubled period of the bank's existence would thereupon have come to an end and the bank would still be in business as a strong and honored financial institution in the City of Portland. Why this plan was not carried into effect and why the bank, which in December, 1926, was expected to emerge soon from its troubles, on March 29, 1927, forever closed its doors, brings us to the final chapter in the history of the unfortunate institution.

After the return of Messrs. Price and Stewart from San Francisco about Christmas of 1926, the officers and directors of the bank were very active in their attempts to induce all of the stockholders of the bank to make subscriptions to the stock of the liquidating company. The principal difficulty encountered was in procuring the required payment from J. E. Wheeler, who held a large block of the stock of the bank (R. 674) amounting to 4700 shares. (R. 428.) Mr. Olmstead had in immediate charge the task of procuring from Mr. Wheeler the necessary funds and from time to time reported to the Board with respect to the progress that Mr. Wheeler was supposed to be making in liquidating some of his assets which would enable him to pay the amount of his desired subscription. (R. 674.) Nor was it until the discovery of the so-called "float" in February, 1927, by which Wheeler abstracted from the bank $800,000.00 of its funds, that the Board knew

that the consummation of this plan, as agreed upon with the Comptroller, could not be effected, and that some other action would have to be taken if the bank were to be saved.

It appears from the testimony of some of the minor officers of the bank that beginning in July or August of 1926, McCormick Lumber Company (a J. E. Wheeler company) began the practice of making deposits of checks and drafts drawn on the Brookville Title and Trust Company, Forrest County National Bank and Titusville Trust Company for which immediate credit was given McCormick Lumber Company, but which checks and drafts were frequently dishonored by the banks upon which they were drawn. When dishonored, these checks were held in an account of the bank known as "cash items" until they were removed therefrom upon other checks or drafts being substituted therefor. All such checks exceeding $1,000.00 in amount upon his orders were referred to and O.K'd for immediate credit by Olmstead, the president of the bank (R. 594), who was fully informed about and whose actions made possible these fraudulent transactions. (R. 594.) But it does not appear that any of the defendants in this case, other than Olmstead himself, knew of the existence of this practice until some time between the 7th and 8th of February, and the 15th of February, 1927. The situation was not discovered by the Examining Committee when it made its examination beginning November 19, 1926, nor was it discovered by Chief National Bank Examiner Harris when he made his examination which was completed on

October 26, 1926. During the period from May 6, 1926, to March 1, 1927, the account "cash items" varied from nothing to a maximum of $823,877.45 on February 28, 1927 (R. 579, 580, 581), which date was subsequent to the discovery of the "float," after which the practice was immediately stopped by mandate of the Board of Directors and the dishonored items permitted to accumulate. (R. 655.) The "cash items" were nominal and proper in amount on the dates on which Examiner Harris and the Examining Committee made their respective examinations in the fall of 1926.

The existence of the "float" was discovered by vice-president Jones some time in February, 1927, who immediately informed vice-president Skinner. (R. 559.) Mr. Skinner places this date in the first week of February. (R. 735.) Mr. Skinner immediately revealed the situation to vice-president Stewart, who procured a list of the dishonored checks in the cash items (R. 729) and together Messrs. Skinner and Stewart transmitted the information to Mr. Price, the chairman of the Board. Mr. Price, who up to that time had had entire confidence in Mr. Olmstead, questioned him with respect to the situation the following morning, and then forced from him the truth. (R. 679.) On the same day (Wednesday) Mr. Price called a meeting of the Board of Directors, and this meeting was held on the following Friday, on which day Wheeler returned from San Francisco.

When confronted with the situation by the Board, Wheeler confessed his inability to provide the bank with funds to discharge the worthless paper with which he

had flooded it. (R. 681.) The directors were almost constantly in session, with innumerable meetings night and day. (R. 726.) The plan to organize a liquidating company with a cash capital of $750,000.00, upon which the directors had been working, had to be abandoned because there was now that unexpected and presumably complete loss of an additional $800,000.00. To raise this sum, with Wheeler at the end of his rope, seemed to be an impossibility. (R. 683.)

Then it was that attempts were made to sell the bank. Separate negotiations were carried on with the United States National Bank and with the First National Bank, but the negotiations with the United States National Bank were not pressed because the negotiations with the First National Bank had gone forward faster, and the negotiations with the First National Bank were finally dropped because it declined to purchase unless, in addition to the present assets of the bank, a fund of $2,250,000.00 in cash were deposited to protect the First National Bank against the possibility of loss. (R. 684.)

The Board felt that if two million dollars had to be advanced in any event, it would be more to the advantage of the stockholders to render this sum available for the Northwestern National Bank, continuing the latter in business, and preserving the earning value of the institution. (R. 684.)

In an attempt to carry this plan into effect two plans were discussed, one the organization of a state bank with two million capital to purchase the business of the Northwestern, the other a one hundred per cent assess-

ment upon the stock of the Northwestern, with continuation of the latter under its existing charter. (R. 685.) At a meeting held late in February, 1927, the directors determined to secure subscriptions immediately for the two million required irrespective of which plan might be finally adopted, and almost the entire sum was actually subscribed that same night. Tentatively decision was reached that the plan of organizing a state bank was the better, but on more mature deliberation it was concluded that there were more elements of weakness than of strength in this plan and the final conclusion was arrived at that there should be imposed an assessment of one hundred per cent upon the stock of the existing bank, and that that bank should carry on. (R. 687.)

The local bank examiner was advised of the decision. The money was subscribed. The Board was convened. Olmstead presented his resignation and Price was elected president.

In order to effect an involuntary assessment of one hundred per cent upon the stock of the bank, it was necessary that, as a result of an examination of the bank, the determination be reached by the Comptroller that the assets of the bank were impaired to the extent of one hundred per cent of its capital. Examiner Crowley and Chief Examiner Harris, who made the examination, found it difficult to convince themselves that this impairment actually existed (R. 687), but nevertheless and to make an involuntary assessment possible, upon completion of the examination on March 5, 1927, Chief Examiner Harris estimated the losses of the bank

at $2,446,769.65. This was a sum slightly in excess of the entire capital, surplus and undivided profits of the bank. (R. 413.) The directors thereupon requested the Comptroller to issue a formal notice of impairment of capital so that they might proceed with the collection of an assessment of one hundred per cent, payment of which assessment was guaranteed by certain of the responsible shareholders of the bank. (R. 414.)

In the meantime the Board appreciated that the resignation of Mr. Olmstead would occasion comment and cause some withdrawals, and every effort was made to get the bank into the best possible condition to meet any adverse results that might follow the reorganization of the bank. (R. 688.) The directors feared the effects of rumor and felt that were publicity attached to the "float" dire results might follow. This was true even though arrangements had already been effected to replace the lost capital. (R. 721.) For this reason, and because of the known responsibility of the Pittock Estate, announcement of the change of management was made through the Morning Oregonian on the 2nd of March, 1927, in the form in which it appears in the bills of complaint. (R. 24.)

But in spite of all of the efforts of the directors, rumors affecting the condition of the bank became current. These rumors resulted in a decrease in deposits and excess of withdrawals. (R. 688.) There was the specific rumor of a defalcation in the bank, and efforts were made to explain the true situation to the people who had heard about it. (R. 688.) Indeed, there was no condition sufficient to cause any alarm among the

executives of the bank until four or five days before it closed (R. 688). On Friday, the situation became acute. The city was honeycombed with telephone calls about the condition of the bank. (R. 689.)

Mr. Price was in California engaged in efforts to increase the resources of the bank by collection of a substantial amount owing it by Portland Dollar Lumber Company and by procuring increases of the deposits of the Southern Pacific Company and the Standard Oil Company. (R. 689.) He was advised of the situation by long distance telephone on Friday and on Saturday left for Portland, where he arrived Monday morning. On Monday a crowd of depositors assembled at the bank and still remained when the bank finally closed its windows at six o'clock in the evening. The final run was under way.

The Portland Clearing House Association was urged to stand behind the bank but it declined to do so. There was then done the only thing which could have been done to make possible the meeting of the demands of depositors for their money, namely, the transfer of the assets of the bank to the First National Bank and United States National Bank under an assumption by the latter of the deposit liability of the Northwestern National Bank.

The terms of this agreement were onerous. (R. 425.) The agreement itself was made possible only by the gentlemen who are in this court as defendants pledging their personal fortunes to the extent of two million dollars and subordinating their claims to this extent to the claims of all others, while at the same time their

stockholders liability remained unaffected. It is to their lasting credit that they acted as they did. Liquidation of the bank thus accomplished doubtless prevented the suspension of many of the correspondent country banks of the Northwestern National scattered through Washington, Oregon and Idaho. (R. 726.) It made possible a liquidation without sacrifice and it prevented the necessity of an assessment upon the stockholders which, in the case of liquidation by a receiver, would have been inevitable. (R. 727.)

As soon as it became possible to do so the entire matter was submitted to the stockholders, and the action of the directors was approved by the affirmative vote of 16,915 shares out of a total of 16,955 shares represented at the meeting. (R. 435, 439.) Nor has there been any attack upon any of the directors except by these appellants, each of whom it is to be remembered, is seeking to avoid payment of his indebtedness to the bank as part of the relief sought for by him in his suit. (R. 28, 191.)

The history ends. So far as these defendants are concerned, except the defendant Olmstead, for whom we do not appear, it is a story of honor and not dishonor. In consideration of the more detailed argument which follows it is believed that this court will find, as did the lower court, that "these gentlemen were diligent in the administration of the affairs of this institution, exercised their best judgment after inquiring into and considering all the facts as far as they could. The Executive Committee consisted of seven members. It met once a week and passed on loans and lines of credit,

considered the bank policy, discussed with the executive officers the condition of its several obligations. The Examining Committee made regular examinations twice a year. The Board of Directors held full meetings of the Board once each month when these matters were reviewed and discussed, and plans developed concerning administration, and it seems to me, under all the circumstances of this case, it cannot be said that these directors were negligent to such an extent, if at all, as would justify a court in imposing any liability upon them. They may have erred in judgment but if so they are not responsible for that, and I am not prepared to say, on this testimony, that there was any error in judgment in the various transactions had by the Board. We must judge their acts by the conditions as they existed at the time the action was taken and not by subsequent developments, and therefore I conclude that the bills in each of these cases must be dismissed, and it is so ordered."

BRIEF OF THE ARGUMENT

1. Directors are not insurers of the fidelity of the agents whom they have appointed and who are not their agents but the agents of the corporation.

Briggs v. Spaulding, 141 U. S. 132, 35 L. Ed. 662.
Rankin v. Cooper, 149 Fed. 1010, 1013.
Devlin v. Moore, 64 Ore. 433, 462.

2. Directors are not responsible for loss resulting from the wrongful acts or omissions of other directors or agents of the corporation unless the loss is the consequence of their own neglect of duty either for failure to supervise the business with attention or neglecting to use proper care in the appointment of agents.

Briggs v. Spaulding, supra.

3. Bank directors are not trustees in any technical sense. The relation between them and the corporation is rather that of principal and agent.

Briggs v. Spaulding, supra.

4. The directors of banks from the nature of their undertaking are called upon to exercise nothing more than ordinary care and attention. It is not contemplated that they should devote their whole time and attention to the institution to which they are appointed and guard it from injury by constant supervision.

Briggs v. Spaulding, supra.
Rankin v. Cooper, supra.
Swentzel v. Penn. Bank, 147 Pa. 140, 15 L. R. A. 305.

5. A director cannot be held liable for being defrauded; to do so would make his position intolerable.

Briggs v. Spaulding, supra.
Land Credit Company of Ireland v. Fermoy, L. R. 5 Ch. 763, 770.
Swentzel v. Penn. Bank, 147 Pa. 140, 15 L. R. A. 305.

6. Directors are not liable, in the absence of positive misfeasance, for passive negligence; it must appear that the losses for which they are required to respond were the natural and necessary consequence of omission on their part.

Briggs v. Spaulding, supra.

7. It is not a violation of law to permit the executive officer of a bank to conduct its business provided that reasonable oversight is kept by the directors.

Briggs v. Spaulding, supra.
Rankin v. Cooper, supra.

8. There is no law requiring bank directors to adopt a system of espionage in relation to the executive officers, or to set a watch upon all their actions. They are supposed to be honest until the contrary appears.

Briggs v. Spaulding, supra.
Rankin v. Cooper, supra.
Bates v. Dresser, 251 U. S. 524. 64 L. Ed. 388.
Bates v. Dresser, 250 Fed. 525.

9. Knowledge of what the books and records would have shown is not to be imputed to the directors. If such was the law the position of a director of a large corporation would be one of constant peril.

Briggs v. Spaulding, supra.
Murray v. Third National Bank, 234 Fed. 481, 490.

10. A director is not liable for false statements made in a report prescribed by the Federal statutes unless he had actual knowledge of its falsity. Mere negligence in participating in such a report is not actionable either because of a directors' common law liability or that fixed by statute.

Gamble v. Brown, 29 (2d) Fed. 366, 370.
Yates v. Jones National Bank, 206 U. S. 158, 551 L. Ed. 1002.

11. A director is not liable for alleged false statements except to those who have acted upon such reports to their damage by purchase of the bank's stock or by depositing funds with the bank.

Chesbrough v. Woodworth, 244 U. S. 72, 61 L. Ed. 1000.

12. Inasmuch as the damages are personal to the party so deceived he must sue in his own right and not for the association or other stockholders or depositors and the action is one at law.

Chesbrough v. Woodworth, supra.
Benton v. Deininger, 21 Fed. (2d) 657.

13. Where such an action is brought the provisions of the Federal statute are exclusive and preclude the common law liability for fraud and deceit and must be measured by the words of the statute.

Chesbrough v. Woodworth, supra.
Curtis v. Metcalf, 265 Fed. 293, 296.

14. No one can contend that a director must look into details of management or keep closely in touch with routine matters or know intimately to whom credits are given, but he is responsible for the exercise of supervisory control and must be held to know something of the more important concerns of the association.

McCormick v. King, 241 Fed. 737 (9th Circuit).
First National Bank v. Noyes, 257 Fed. 591, 600.

15. The limitation of U. S. R. S. 5200 upon the total liabilities of any single borrower to a national bank will not be construed as including his liability as surety or indorser for money borrowed by another.

Corsicana National Bank v. Johnson, 251 U. S. 68, 64 L. Ed. 141.
Gamble v. Brown, 29 (2d) Fed. 366, 375.

16. Where a bill alleges aggregate loans to an individual in excess of those permitted under Revised Statute 5200, it should clearly show whether the defendants are to be charged with the whole loan or only with the excess, for the liability under Section 5239 applies only to the particular loans which exceeded the statutory limit.

Curtis v. Metcalf, supra.
Witters v. Sowles, 43 Fed. 405.
Rankin v. Cooper, 149 Fed. 1010, 1017.
Stephens v. Overstolz, 43 Fed. 771, 775.

17. It is insufficient to charge in general terms that a large part or the whole of a loss from a loan might have been saved by action with reasonable promptness.

Curtis v. Metcalf, 265 Fed. 293, 296.

18. Where defendant directors are charged with negligence, the bill must specify the action or inaction relied upon, as the defendants are entitled to know the kind of alleged negligence upon which the complainant will rely.

Curtis v. Metcalf, supra.

19. Defendants' failure to move against the bill does not relieve the complainant of the duty of proving those facts necessary to constitute a cause of suit against the defendants. An uncertain and insufficient bill may be aided by definite and sufficient proof but failure on the part of the defendants to move against an insufficient or uncertain bill does not entitle the complainant to relief when his proof is as insufficient or uncertain as his bill.

Curtis v. Metcalf, supra.

20. Directors are not liable for mistakes in judgment.

Fidelty Loan & Savings Co., 142 Va. 43, 128 S. E. 615, 45 A. L. R. 664.

Braswell v. Pamlico Ins. & Bkg. Co., 59 N. C. 628, 42 L. R. N. S. 101.

Dunn v. Kyle, 14 Bush. 134.

Sperings' Appeal, 71 Pa. 11.

Muller v. Planters Bk. and Trust Co., 169 Ark. 480, 275 S. W. 750.

Am. Sav. Bank & Trust Co. v. Earles, 113 Wash. 629, 194 Pac. 555.

In discussing the law applicable to this case we deem it wise to attempt to clarify the atmosphere of the fog of language by narrowing the issues and endeavoring to show what is actually involved in these appeals.

1. It is not claimed that these defendants were in any sense guilty of fraud or deceit or of any kind of speculation or conversion of the assets of their bank to their own benefit, or of any misuse of their powers to their individual advantage.

2. It is not claimed that the actions of any of the directors other than Olmstead were induced by any motive other than that of benefiting the bank and safeguarding its stockholders and depositors.

3. It is not claimed that the defendants, when called upon to make decisions, did not honestly exercise their own best judgment and discretion.

4. It is not claimed that the defendants did not attend all meetings of the board or give such time and attention to the bank's affairs as is ordinarily required of bank directors.

5. With the exception of directors Skinner, Stewart and Price, it is not claimed that any of the defendants had the slightest knowledge of the criminal actions of Olmstead and Wheeler with regard to the "float."

6. As to Skinner and Stewart, the proof is overwhelming that they did not have such knowledge except that on possibly two or three occasions attention was called to the fact that certain foreign items which the McCormick Lumber Company had deposited had been returned dishonored and that upon making inquiry of the president of the bank, who had charge of that account, were assured by him that the checks had been taken care of.

7. As to Price, the evidence is overwhelming that he never had knowledge of the float or of anything which would arouse the suspicion of an ordinarily prudent man.

8. No excess loans were made at any time unless it be claimed that the Wheeler float was such. No evidence was offered that any of the loans specified in the bill of complaint were at the time they were made other than legitimate banking loans to persons or concerns who were at the time entitled to the credit advanced them.

9. No evidence was offered that the directors and executive officers of the bank did not exercise every possible effort to realize upon frozen and unsatisfactory loans and to reestablish the bank upon a dividend-paying basis.

10. The Wheeler float was cleverly concealed at the time of the examinations made by Harris, the Federal Bank Examiner and the examining committee by removing dishonored checks from "cash items" where they would be readily discovered, by substituting new checks, (O. K.'d by Olmstead and sent forward for collection to the eastern banks upon which they were drawn), and thus concealed in the account "items in transit."

11. The Board of Directors as and when losses were ascertained, and at all times when they received either direction or suggestion from the bank examiners or the comptroller, charged such losses from the assets of the bank and never included them in their reports as a part of the bank's assets.

12. Neither of the complainants either purchased their stock or deposited money in the bank relying upon any alleged false or misleading statements of assets or liabilities.

In order to hold these defendants liable in this case an entirely new and unheard of rule must be established, which would be abhorrent to every principle of equity and law, and which would cast such an onerous and intolerable burden upon able conscientious and sub-

stantial members of the community that no man could afford to accept a directorship in any railroad, bank or corporation of large business affairs.

Stripped of its verbiage, complainants say to the defendants:

(a) It is immaterial that you were honest;

(b) It is immaterial that you did not use your office for wrongful ends;

(c) It is immaterial that you used your best judgment;

(d) It is immaterial that you exercised at least ordinary care;

(e) It is immaterial that the loans which you made and approved were at the time of their making legitimate, proper, and good banking;

(f) It is immaterial that the persons and firms to whom you loaned money were entitled to the credit and were solvent;

(g) It is immaterial that when the general deflation came that you took every action which your honest judgment deemed necessary to safeguard the bank and realize upon its loans.

(h) It is immaterial that you had made plans and pledged the necessary funds to remove the frozen assets and restore the bank to a liquid condition;

(i) It is immaterial that you attended all of the prescribed meetings of the Board of Directors, and in addition thereto conferred informally with each other

and with the executive officers with regard to the affairs of the bank, and adopted such measures as your best judgment dictated;

(j) It is immaterial that Wheeler and Olmstead without your knowledge criminally abstracted $800,000 of the bank's assets;

(k) It is immaterial that in order to save the depositors and the stockholders you pledged your individual fortunes to the extent of $2,000,000 in addition to your statutory stockholders' liability,—

The fact remains that the bank suffered severe losses by the criminal acts of Olmstead and Wheeler, and by reason of failure to realize upon loanes which were legitimate and proper in their inception, but which, by reason of the period of deflation, became frozen or unsatisfactory as bank assets. Therefore it is incumbent upon you, out of your personal fortunes to make good every item which was ever in the bank from its inception and upon which one hundred cents on the dollar was not realized.

The trial court made a pertinent inquiry of complainants' counsel at the time of argument, which he did not then answer and which cannot be answered. We quote substantially: "What should the directors have done with the frozen loans in the bank?" "What it their duty to remove these loans by using their own funds?" Complainants' counsel had no concrete or definite suggestion as to the first of these inquiries and frankly stated that he did not consider it the duty of the directors to individually remove the frozen loans.

The federal courts have had occasion in many cases to consider and determine the duties and obligations assumed by directors of national banks. These duties and obligations have been concisely capitulated by the learned judge in

Rankin v. Cooper, 149 Fed. 1010

as follows:

"1. Directors are charged with the duty of reasonable supervision over the affairs of the bank. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision over its affairs. 2. They are not insurers or guarantors of the fidelity and proper conduct of the executive officers of the bank, and they are not responsible for losses resulting from their wrongful acts or omissions, provided they have exercised ordinary care in the discharge of their own duties as directors. 3. Ordinary care, in this matter, as in other departments of the law, means that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances. 4. The degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances. 5. If nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, upon the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent

man on his guard, then a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. 6. Directors are not expected to watch the routine of every day's business, but they ought to have a general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally to know of and give direction to the important and general affairs of the bank. 7. It is incumbent upon bank directors, in the exercise of ordinary prudence, and as a part of their duty of general supervision, to cause an examination of the condition and resources of the bank to be made with reasonable frequency."

Testing the conduct of the defendants in this case by the rules there laid down, we find that they have fully met the standards set forth. The directors exercised reasonable supervision over the affairs of the bank. They met frequently, they discussed the loans, discounts, deposits, slow loans, and general affairs and bank policies. In addition, they had an executive committee which met weekly and passed upon each loan made by the executive officers during the preceding week, and came to a determination upon applications for the larger loans, namely, those in excess of $25,000. In a bank of that size it was necessary to place larger lines of credit in the hands of different executive officers. The wisdom and the necessity of this course is apparent. No one man could keep in touch with the

business affairs of every customer of the bank using its credit. Certain lines of credit therefore were necessarily placed under the particular charge of the president, Emery Olmstead, others under the charge of vice-president Charles Stewart, others in charge of vice-president Skinner. Smaller loans were acted upon by assistant vice-president Jones. Except in those cases, therefore, where the directors had personal knowledge with regard to the customers' affairs, they relied to a large extent upon the detailed information transmitted to them by the executive officers, who appeared before them at their frequent meetings and discussed with them the policies of the bank, and the credits to be extended to its customers.

It would be as unfair and impracticable to charge the directors with negligence in not having an intimate personal knowledge of each loan made as it would be to require a director of the United States Steel Corporation or of a large railway corporation to have intimate knowledge of the details with regard to every transaction of the company which he represented. In these days of large business transactions, delegation of authority is essential, and the directors must from the very necessity of things rely to a large extent upon the technical or special knowledge of the executives whom they appoint to act for the corporation. See—

Briggs v. Spaulding, 141 U. S. 132, 35 L. Ed. 662.

Mason v. Moore, 4 L. R. A. (N. S.) 597; 73 Ohio State 275.

The fact that Wheeler, one of the bank's largest stockholders, with the active cooperation of Olmstead as president, succeeded in misappropriating practically $800,000 of the bank's funds by means of false credits obtained by the deposit of checks drawn on eastern banks and subsequently dishonored by them for lack of funds, does not render the directors liable, inasmuch as they are not insurers or guarantors of the fidelity and proper conduct of the executive officers of the bank.

We do not mean to say that where directors had actual knowledge of the fraud of a trusted employee, or where they had knowledge of acts sufficient to arouse their suspicion and to put them on guard, and then permitted the suspected employee to continue in his practices, they would not be liable. They had no reason to suspect Olmstead's honesty or trustworthiness. His wisdom in making loans had been questioned and the Board of Directors in 1924 had passed a formal resolution limiting his power and that of other executive officers in that regard; but that resolution was not based upon any suspicion of his probity. The evidence discloses that several of the junior officers of the bank were aware of the fact that the McCormick Lumber Company checks were being returned dishonored by the banks upon which they were drawn, but this fact was not drawn to the attention of any of these defendants with the exception that it is claimed that Bates, the cashier, sometime in July or August, 1926, informed director Skinner that some of the McCormick items were coming back. Skinner took the matter up with President Olmstead, who informed him that the matter

had been taken care of. There is nothing unusual or alarming about the fact that checks deposited by a customer are returned;—that is common to every bank every banking day, nor is it a matter of alarm that a customer may issue one or more checks which his bank is compelled to dishonor because of lack of funds. Those are matters of routine which are handled by the officer of the bank having charge of that account, and upon his assurance that the matter has been taken care of, in the absence of any other circumstances the affair would and should end.

Olmstead claims that sometime in July, 1926, he knew for the first time that McCormick checks in volume were coming back and that he informed the defendant Price of this fact. This Price specifically denies and the testimony thoroughly discredits Olmstead's story with regard to that. It is apparent that from the inception of the float in the spring of 1926, Olmstead had both knowledge of and was an active participant in the transaction, and it was only by his continued participation that it grew to such alarming proportions.

In view of the prompt action taken by Jones, Skinner, Stewart and Price when they first learned of the float in February, 1927; in view of the further fact that during those months Price was actively engaged in organizing a holding company to remove frozen assets from the bank, which involved stock subscriptions from all of the stockholders in the bank, including Wheeler (Record 645, 646); in view of the fact that the defendant directors were constantly urging Olmstead to further efforts in reducing Wheeler's indebt-

edness, it is beyond the realm of probability that Price, if informed in July of a float of $200,000, would have taken no action whatever and would have permitted it to continue until nearly $800,000 had been abstracted from the bank, and the investment of the Pittock Estate, of which Price was one of the trustees, so jeopardized.

Counsel does not point out in his brief, nor did he offer any evidence tending to show that any of the directors other than the defendant Olmstead, did not exercise both the care which ordinarily prudent and diligent men would have exercised under similar circumstances, or that degree of care which the nature of their duties required, and the circumstances of the case demanded. On page 78 of complainants' brief is found the following statement: "The gist of this whole matter is inattention to and mismanagement of the affairs of the bank." No attempt was made by the complainants to prove inattention or to prove mismanagement with regard to the loans made during the history of the bank. The complainants say (p. 99 of brief) that in addition to the Wheeler transactions the directors were guilty of inattention and mismanagement as follows:

"In not seeing what was open, visible and notorious to be seen in and about and upon the records of said bank." No further specification is made as to what they should have seen other than the Wheeler transaction, which will be more fully discussed hereafter.

Next, complainants say (p. 99): "In not acting upon what was or to be seen and thereby to be known in the records of said bank so that said bank might have

and obtain prompt and vigorous management, direction, supervision and activity in regard thereto." Again the specification is vague and neither brief nor evidence discloses what the directors should have seen or what their action should have been in the premises.

Next, negligence is specified, again quoting from p. 99, "In not forcing Wheeler's liquidation in the sale of his publishing business or other properties, and call his then loans that the burden of his indebtedness to the bank might be relieved." In that regard the record is plain that the matter of reducing Wheeler's personal indebtedness and that of the various corporations in which he was interested, received the continuous consideration of the members of the board; that the president of the bank had been directed to use every effort to procure liquidation of these loans; that he was actively engaged in assisting Wheeler to dispose of his timber; that director Collins had from time to time consulted with Wheeler and urged him to liquidate and sell even at a sacrifice. In fact it is only fair to Mr. Olmstead to state that his actions in participating in the float were in all probability induced by a desire to keep Wheeler's head above water until such time as a sale of his redwood timber, which was then in process of negotiation, could be consummated.

With regard to the sale of the TELEGRAM there was a division of opinion as to the advisability of attempting to compel him to make a sale of that property rather than of some of his other property, especially in view of the fact that if a sale should be made it was doubtful if the bank would receive any substantial bene-

fit. Upon those questions different minds had different opinions but the individual directors exercised their own honest judgment. Nor is it true that the directors had any power to compel Wheeler to sell, or that Wheeler was willing to sell. If any of them erred it was an error of judgment for which there is and should be no liability.

It is said that:

> "Mere poor judgment in making loans is not sufficient to form a basis for liabilities of directors for, when they are selected by the stockholders the latter assume the risk of losses occurring on account of defects in judgment and the directors by accepting office merely assume the obligation to manage the affairs of the institution with diligence and good faith."
>
> *Muller v Planters Bank and Trust Company,* 169 Ark. 480; 275 S. W. 750.

It is next specified that the directors were guilty of mismanagement in "waiting and delaying action on matters of importance until an emergency was thereby created (a) in conditioning the assets of the bank; (b) by increasing the Wheeler indebtedness and financial embarassment; and (c) for failing to deal for the sale of the paper on frequent proper occasions of the Telegram Publishing Company, and until that company went broke."

We answer them, using the same classification: (a) The evidence showed that the directors used every endeavor to re-condition the assets of the bank; that the

larger stockholders had formed a plan not only to subscribe for their proportion of the stock in the new corporation, which would take out the frozen assets, but to advance the necessary funds for the proportionate share of incapable or unwilling stockholders. (b) The directors of the bank did not increase Wheeler's indebtedness and financial embarassment, except in one instance, where a loan was made in order to get good collateral. The wisdom of this transaction was demonstrated, as the collateral not only liquidated the new loan but greatly assisted in liquidating the previous ones. However, Wheeler and Olmstead, by means of the float, and without the knowledge or consent of the other directors, succeeded in increasing Wheeler's indebtedness some $800,000, and thereby causing the bank "financial embarassment." (c) The evidence shows that the only time that Wheeler had an actual opportunity of selling the TELEGRAM, a time when the directors were both willing and insistent that he should sell it, Wheeler refused to consummate the deal.

The next specification of mismanagement is "In dallying over a period of years with the comptroller, and failing with promptitude to clean up the matter of financial entanglements which finally overtook them and which were called to their attention by the Comptroller." We are inclined to view with impatience such vague charges, especially in view of the fact that there was no proof to substantiate them, and no suggestion made by the complainants or their counsel as to what should have been done or could have been done by the directors, which they failed to do. Surely one who is

charged with negligence is entitled to know of what his negligence consists and what he should have done that he did not do or what he did that he should not have done. Neither the complaint, nor the evidence nor argument supplies any of these elements.

The next two specifications of mismanagement consist of electing Price to the position of president of the bank. Again complainants use language which we must confess conveys no meaning to us. It is not alleged or proved that Price was inefficient, corrupt or incapable. If the complainants mean by this specification that the fact that he was manager of the Oregonian, or a trustee of the Pittock Estate rendered it improper for him to become president of the bank, we can only say that there is nothing in the record to so indicate. The interests of the OREGONIAN and the Pittock Estate were not antagonistic to the interests of the bank, and certainly none of his actions, either before or after his election, would warrant the presumption of either inefficiency or dishonesty. He evinced steadiness and courage when facing a condition which would try the fortitude of men of higher courage. Without hesitation he pledged his own personal fortune to save the depositors and stockholders of the bank. His actions in the crisis were such as to commend him to the good opinion of his community and to warrant the faith placed in him by Henry L. Pittock in making him one of the trustees of his estate.

Next, plaintiffs specify mismanagement on the part of the defendants "In failing to allay and remove internal dissension and sustain coordinate effort within

the bank by change of management." The evidence shows that losses from loans made subsequent to 1921 were entirely negligible. Nothing transpired from 1923 until February, 1927, to arouse any suspicions as to Olmstead's honesty. The question of change of management was discussed by Price, Metschan and Stewart with the comptroller in 1926 and the comptroller informed them that he thought it would be unwise to make any change in management until after the bank had availed itself of Olmstead's ability in persuading the bank's stockholders to subscribe to the holding corporation, which would remove the frozen assets. (Record, 645, 646.)

Next, it is specified "That the directors were negligent in bringing about an entire change of management in bank policy by the Pittock Estate and the induction of Price." What this change of policy was is not revealed by the evidence or suggested in the brief nor is there any foundation of fact that negotiations carried on by Price with the First and United States National Banks disclosed to the public any weakness in the Northwestern National Bank.

Next, "In knowingly creating and permitting an emergency to develop in the affairs of the bank through their own acts or acts which could have been prevented in the ordinary exercise of business judgment." It should be sufficient to say that the record shows that the directors did not create or permit an emergency to develop, either through their own acts or any act which by the exercise of ordinary business judgment, they

could have prevented. The emergency was created by the unknown acts of a trusted officer in conjunction with one of the largest stockholders of the bank, acts for which the directors were not responsible, of which they had no knowledge, and for which they had no reason for suspicion.

The complainants allege "Mismanagement in knowingly and willingly permitting non-included stockholders in the deal they made to become liable for a stockholder's statutory liability and liability by virtue of the contract to the First National and United States National Banks without first conducting a deliberative vote by the body of the stockholders." Wisdom after the event is available to the most stupid and the man on the sidelines after the play has been made always thinks he is able to point out its defects. However, we have never known swivel-chair strategists to become Napoleons, nor sideline experts to be either successful players or coaches. These directors were faced with a condition and not a theory. They were called upon to meet an emergency which was imperative. Their first duty was to persons who had deposited money in the bank, and to the correspondent country banks, a large part of whose current working capital was deposited with them. Had they not acted with promptness and courage, Portland and the communities in the Pacific Northwest would have suffered a financial satastrophe of tremendous proportions. To induce the First and United States National Banks to assume the deposit liability of the Northwestern, the directors entered into a joint and several guaranty of their personal fortunes

to the extent of $2,000,000. Their action received the support of 16,915 shares out of a total of 16,955 shares. By acting when and as they did the bank was not thrown into a receivership, the depositors received every dollar of their money and, notwithstanding the hurried estimates of uncollectible paper in the bank, the directors have not been called upon to make good their guaranty nor has it been necessary for the Comptroller of the Currency to make any assessment against the stockholders. If the bank's assets at the time of the transaction complained of were not sufficient to discharge the liability for deposits then the statutory liability existed even though no sale were made. If they were sufficient, then no such liability in fact existed. By acting as they did and when they did, as was said by Judge Bean, the following consequences were avoided:

> "The bank would in the nature of things have been compellel to have gone into involuntary liquidation through a receiver appointed by the Comptroller of the Currency, and while the evidence does not disclose particularly the condition of the bank at that time, in view of results that usually and ordinarily obtain in a receivership of that kind, it is not probable that the assets at a forced sale would have been sufficient to take care of its liabilities and therefore there would have been a stockholders' liability remaining against these persons complainants, while now, under the present arrangement, and the way it is working out, as the evidence indicates, these liabilities will probably be paid and discharged without calling on the stockholders and probably with sufficient to re-

turn to the directors the amount of money they deposited as security."

The next item of mismanagement alleged is "By making and renewing excessive loans and knowingly and willingly permitting them to be so made against sound business policy and against the law." The bank made no excessive loans, and with the exception of the Wheeler float the indebtedness complained of was contracted prior to 1923, and was legitimate, proper, and presumably safe at the time the credit was extended. All of the loans were made before directors Collins and Spaulding were elected to office and no evidence was offered that at the time of their inception they were improvident, excessive or improper, and as the learned trial judge said: "It is therefore fair to assume in the absence of evidence, that they were prudently made at the time that they were contracted."

Complainants next allege that incorrect reports were made to the Comptroller. We assume that counsel thereby adverts to the difference between the amount of the capital, surplus and undivided profits shown in the report to the Comptroller and the same items as appeared in the condensed published statements. We are rather surprised that counsel should urge this point, inasmuch as it is perfectly clear from the statements themselves that in the itemized statement to the Comptroller the item "Reserve for taxes, accrued interest" was not included in capital, surplus, and undivided profits but appeared under a separate heading of its own, while in the condensed published statement it was included, and properly included, under those items. Counsel's attention

was called to this matter at the time the evidence was offered and in the course of his argument, and the matter is so plain upon the face of the record that we are at a loss to understand why he should again fall into such an obvious error. On the other hand if the complainants by this specification are contending that the statements made by the bank to the Comptroller and published as required by law were incorrect as to the condition of the assets of the bank, it is only necessary to call the court's attention to the following facts:

This bank, as well as all other national banks, was carefully examined by a national bank examiner at least twice a year. The condition of its assets, the amount and extent of its losses, actual or probable, were, as the examining reports show, known to the Comptroller's office and were the subject of continued correspondence between the office of the Comptroller, either directly or through his representatives, the examiners, and the officers of the bank for a period of several years. No attempt was made to prove that the officers of the bank attempted to conceal from the Comptroller any fact or circumstance with regard to its condition, or the nature of its loans, or the solvency of its borrowers. It is not until the report of September 21, 1926, that any suggestion is made by the Comptroller or the examiners of any impairment of capital, and then the Chief Examiner Harris states that while the officers of the bank had not concurred in the classification he had made, yet as he saw the situation, "*estimated* losses impair your capital in the sum of $237,460.78." It is, of course, the desire of the Comptroller of the Curency that every

national bank have its assets in a liquid condition so that it may be able to meet not only the ordinary demands of business, but that in time of financial depression it may be able to readily turn them into cash. This, however, is an ideal and can never be completely attained. It is likewise self-evident that where a nation or community has undergone a period of tremendous inflation of values and suffered a subsequent deflation in values, in practically every bank which is serving its community as a reservoir of credit a large amount of slow or frozen assets will accumulate, a portion of which, in the gradual process of deflation, may become doubtful and finally result in loss. The fact that a bank has a large amount of slow paper would not justify the examiner or the comptroller in directing them to be charged off as losses or in warranting a court to determine them as losses without the aid of extrinsic evidence of the solvency of the borrower in each case. Until the insolvency of the borrower is actually determined, classification of his paper as doubtful or as a probable loss is purely a question of opinion and judgment. It may well be, as has transpired in the case of the Northwestern National Bank, that the recovery upon items classified as slow or doubtful, or even bad, may be vastly greater than the comptroller or the outside banker who makes a hurried survey would have thought possible. The Comptroller may, in the exercise of his sound discretion, demand of the stockholders of a bank that they remove from its assets any item or any number of items which in his judgment are so slow of liquidation as to make them non-bankable; that is—not suf-

ficiently liquid to warrant their continuation as part of the loans and discounts of a banking institution, but that is far from a determination that the items constitute losses or that they were the result of negligence or mismanagement on the part of the directors. Until such time as the directors, acting honestly, come to the conclusion that a given loan or discount represents a loss to the bank, or until such time as they are directed by the Comptroller to remove such loan or discount from its assets, they are justified in scheduling the items in question as a part of the bank's property.

Counsel has cited the case of

Thomas v. Taylor, 224 U. S. 73, 56 L. Ed. 673, 676, 677

as authority for holding these defendants liable. An examination of that decision will show its utter inapplicability for the following reasons: In the first place, prior to the publication of the statement upon which the plaintiff there purchased his stock, the Comptroller had ordered the directors to charge off loans in the amount of $104,000, which they had failed and refused to do. The court held the directors in that case liable to the man who had purchased stock relying upon the statement as to the condition of the bank as shown by the published statement. We do not have such a condition here. The directors never declined or neglected to remove from the assets of the bank any item which the Comptroller directed should be done, and when the Comptroller suggested removing assets, were diligently

engaged under his direction and with his approval, in carrying out a plan which would comply with his request. Not only that but in the early part of 1927, a time when counsel contends the entire capital stock, surplus and undivided profits had been wiped out, the defendant Pittock, who had full knowledge of the condition of the bank, purchased stock from Lindner at the price of $120.00 per share.

Again, neither Burckhardt nor Ballin purchased stock relying upon any statement to the Comptroller, or published in the newspapers, or upon any representation of any of these defendants that was false, fraudulent or misleading. Nor if they had so done could they maintain this suit. They here sue not only for themselves, but for the benefit of all other stockholders in the bank. The action would be one of fraud or deceit. It is a personal action for damages at law and not one which can be maintained on behalf of a complainant for himself and the association or other stockholders or depositors.

Chesbrough v. Woodworth, 244 U. S. 72, 61 L. Ed. 1,000.

Benton v. Deininger, 21 Fed. (2d) 657.

It had been contemplated before the discovery of the Wheeler float that $1,500,000 worth of the slow assets of the bank be removed by the formation of a corporation whose stockholders should be stockholders in the bank. The discovery of the Wheeler float made this plan impracticable and a one hundred per cent. stock assessment the only feasible way to rehabilitate

the bank to the satisfaction of the Comptroller. On March 18, 1927, as shown by the letter to the Comptroller quoted on page 31 of appellants' brief, the directors stated: "The payment of an assessment of 100% has been guaranteed by certain responsible shareholders, a copy of which guaranty is submitted herewith."

Complainants make much of the testimony given by Mr. Ainsworth and Mr. Dick that in the hurried examination which they made at the time of the run, in their judgment it would have taken four million and a half to six million four hundred thousand dollars to have rehabilitated the bank's condition. It is to be remembered, however, that this examination was made in an emergency without opportunity to make detailed examination into the assets of the bank, *and was made with a view of taking over the entire deposit liability and being prepared to pay it out over the counter to the depositors who as a result of the run were demanding payment.* That these figures were entirely inaccurate is shown by the testimony which demonstrated that not only was it unnecessary to call upon the directors to make good their $2,000,000 guaranty but that it was not necessary for the Comptroller to make a stock assessment, and that the assets of the bank, as found by the trial court, will be sufficient to liquidate all of the bank's obligations.

A sound and reasonable test to be applied to the acts of bank directors is prescribed in Swentzel v. Penn Bank, 147 Penna. 140, 15 L. R. A. 305;

"It cannot be the rule that the director of a bank is to be held to the same ordinary care that he takes of his own affairs. He receives no compensation for his services. He is a gratuitous mandatary. His principal business at the bank is to assist in discounting papers, and for that purpose he attends at the bank at stated periods—generally once or twice a week—for an hour or two. The condition of the bank is then laid before him in order that he may know how much money there is to loan. Once or twice a year there is an examination of the condition of the bank in which he participates. The cash on hand is counted, the bills receivable and securities examined, to see whether they correspond with the statement as furnished by the officers. Beyond this he has little to do with either the cash or the books of the bank. They are in the care of salaried officials, who are paid for such services, and selected by reason of their supposed integrity and fitness. To expect a director, under such circumstances, to give the affairs of the bank the same care that he takes of his own business, is unreasonable, and few responsible men would be willing to serve upon such terms. In the case of a city bank, doing a large business, he would be obliged to abandon his own affairs entirely. A business man generally understands the details of his own business, but a bank director cannot graps the details of a large bank without devoting all his time to it, to the utter neglect of his own affairs. * * * In Spering's App., 71 Pa. 11, the subject is very fully discussed by the late Justice Sharswood, and the rule of ordinary care

is laid down. Not, however, the ordinary care which a man takes of his own business, *but the ordinary care of a bank director in the business of a bank.* Negligence is the want of care according to the circumstances, and the circumstances are everything in considering this question. The ordinary care of a business man in his own affairs means one thing, and the ordinary care of a gratuitous mandatary is quite another matter. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as a man can give, in a short space of time, to the business of other persons from whom he receives no compensation. The same learned judge, in Maisch v. Savings Fund, 5 Phila. 30, laid down the rule as follows: 'As to the directors, however, * * * receiving no benefit or advantage, they can be considered only a gratuitous mandataries, liable only for fraud or such gross negligence as amounts to fraud.'

"Again, in Spering's Appeal, supra, he said: 'Indeed, as the directors are themselves stockholders, interested as well as all others that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all the stockholders, we raise a strong presumption that they have brought to the administration their best judgment and skill.' * * *

"In regard to what is ordinary care, regard must be had to the usages of the particular business. Thus, *if the director of a bank performed his duties as such*

in the same manner as they were performed by all other directors of all other banks in the same city, it could not fairly be said that he was guilty of gross negligence; and *care must be taken that we do not hold mere gratuitous mandataries to such a severe rule as to drive all honest men out of such positions.* This thought is so well expressed by Sir George Jessel, M. R., in his opinion in Re Forest of Dean Coal Min. Co., L. R. 10, Ch. Div. 450, that I give his remarks in full: 'One must be very careful, in administering the law of joint stock companies, not to press so hard on honest directors as to make them liable for those constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all. On the one hand I think the court should do its utmost to bring fraudulent directors to account; and, on the other hand, should also do its best to allow honest men to act reasonably as directors. Willful default no doubt includes the case of a neglect to sue, though he might, by suing earlier, have recovered a trust fund; in that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle'."

Again, in the case of Devlin v. Moore, 64 Ore. 433, 462, the duties of a director are epitomized as follows:

"10. As a general rule, directors are charged with the duty of reasonable supervision over the affairs of the bank. It is their duty to use ordinary diligence

in ascertaining the condition of its business and to exercise reasonable control and supervision over its affairs. They are not insurers or guarantors of the fidelity and proper conduct of the executive officers of the bank and are not responsible for losses resulting from their wrongful acts or omissions, provided they have exercised ordinary care in the discharge of their own duties as directors.

"11. Ordinary care, in this matter as in other departments of law, means that degree of care which prudent and diligent men would ordinarily exercise under similar circumstances. The degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances of that particular case. If nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, on the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. Directors are not expected to watch the routine of every day's business, but they ought to have a general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally to know of

and give direction to the important and general affairs of the bank. They are not required to be bookkeepers.

"12. It is incumbent upon bank directors in the exercise of ordinary prudence and as a part of their general supervision to cause an examination of the condition and resources of the bank to be made with reasonable frequency. Rankin v. Cooper (C. C.), 149 Fed. 1010, 1013. See, also, Campbell v. Watson, 62 N. J. Eq. 396 (50 Atl. 120).

"13. To render directors or other officers of a corporation liable to it for the fraudulent or wrongful acts of other officers, they must have participated therein, or else they must be chargeable with culpable negligence. Clark & Marshall, Private Corporations, Vol. 3, p. 2279, Par. 751; Briggs v. Spaulding, 141 U. S. 132 (11 Sup. Ct. 924; 35 L. Ed. 662).

"14. If a director performs his duty as such in the same manner as such duties are ordinarily performed by all other directors of all other banks of the same city, it cannot be fairly said that he was guilty of gross negligence. Swentzel v. Penn. Bank, 147 Pa. 140 (23 Atl. 405, 415: 15 L. R. A. 305: 30 Am. St. Rep. 718, 722); Bolles, Modern Law of Banking, p. 280; Spering's appeal, 71 Pa. 11, 21 (10 Am. Rep. 684).

"15. The president, cashier, and other employees of the bank, although selected by the directors, are not the agents or servants of the directors, but of the corporation. Briggs v. Spaulding, 141 U. S. 132 (11 Sup. Ct. 924; 35 L. Ed. 662); Wallace v. Lincoln

Savings Bank, 89 Tenn. 630 (15 S. W. 448: 24 Am. St. Rep. 625; Morawetz, Private Corporations, Par. 552, et seq."

A particularly instructive case is that of Williams v. Fidelity Loan and Savings Company, 142 Va. 43, 128 S. E. 615, 45 A. L. R. 664, because it deals with loans, made during the same period of inflation, which, as a result of the subsequent deflation, became practically worthless. The Court holds that errors in judgment do not render directors liable. In the note found at page 683 the cases are collated, sustaining this rule of law, to which there does not seem to be any exceptions. See, also, American Savings Bank and Trust Company v. Earles, 113 Wash. 629, 194 Pac. 555.

We find on pages 110 and 111 of plaintiffs' brief, quotations from the opinion of the District Judge in the case of Bates v. Dresser, et al, 229 Fed. 798 as supporting complainants' contention that the directors are liable for negligence in not ascertaining the existence of the Wheeler float. This case was appealed to the Circuit Court of Appeals (250 Fed. 525). From that decision an appeal was taken to the Supreme Court of the United States, which rendered its opinion in Volume 251 U. S. at page 524, 64 L. Ed. 388. The District Court held all of the directors liable for the loss occasioned by the dishonesy of one of the bank's employees, on the ground that if they had made a check of the records they would have made an early discovery of the defalcation.

By a strange oversight, counsel has overlooked the fact that except as to the defendants Dresser, who had

been repeatedly warned of the employee's dishonesty, the decree of the lower court was reversed in toto, and that this action of the Circuit Court of Appeals was sustained by the Supreme Court of the United States. The Circuit Court of Appeals specifically declined to apply the test of liability laid down by the District Court, and we take the liberty of quoting at length from this decision:

"The negligence of the defendant directors, because of which the court has found them liable, is therefore not any failure in duty on their part before September 30, 1907. It consists wholly in their failure, on or after that date, to discover that Coleman was practicing his method of stealing the bank's funds and was so manipulating the entries on its depositors' ledger from time to time, as to prevent their showing what he had done or was doing, except by resort to a more thorough and searching examination and checking of said entries than any which had ordinarily been made by the directors. * * * If negligence, as above appears, is not chargeable to the directors in respect of any of Coleman's stealings before September 30, 1907, it follows that they cannot be held responsible merely because of the deficiencies permitted by Earl to exist in the methods or routine followed in conducting the bank's regular operations or in recording them on its books, notwithstanding that it was by taking advantage of such deficiencies that Coleman was able to accomplish and conceal his stealings. They are entitled to rely, as they did, upon Earl to guard against any such deficiencies, and until some

special necessity for such action was brought to their attention they were under no duty to inquire or interfere independently of him.

Briggs v. Spaulding, 141 U. S. 132, 165, 166;
Warner v. Penoyer, 91 Fed. 587, 590, 591,
44 L. R. A. 761.

* * * * * *

The court found that no examinations (by the directors) except the two shown by the records as above, were made in 1907, 1908, or 1909.

* * * * No directors' examination, whenever or however made, having before extended to such verification of the figures found on the depositors' ledger as, in the view of the court, was necessary to an adequate performance of the directors' duties, it results that the real inquiry is whether their failure to make the kind of examinations and comparisons deemed necessary by the court, on September 30, 1907, was a failure in duty on their part so clearly negligent as to warrant the court in rejecting the master's findings, and to render the directors all responsible for the subsequent losses by Coleman's stealings. If not so liable as of that date, it is plain they are not so liable for the subsequent failures to make like examinations before each dividend subsequently declared.

"To hold all of the directors chargeable with negligence rendering them all so responsible, merely because they failed to make the additions and comparisons held necessary by the court, requires, in our opinion, the application of a standard of diligence

more exacting than any heretofore applied in the case of national bank directors; nor can we regard application of such a rule as justified by the circumstances here shown.

"We do not think it can be said that there would necessarily have been a negligent breach of duty on the part of every director, had examinations in accordance with Article 19 of the By-laws been wholly omitted during the period here involved; no special reason tending to forbid such omission being shown. * * * *

" * * * We see no reason to doubt that the requirements of Article 19 might have been waived, their observance omitted by the directors, if regarded by them as no longer necessary, in the absence of special circumstances showing such waiver or omission to have been inconsistent with good judgment and reasonable prudence. Non-observance of a similar By-law for fourteen years appeared in the above case of Briggs v. Spaulding; the matters covered by it having been left by the directors wholly to the president and cashier and without any formal amendment or repeal of the By-law. The directors were nevertheless exonerated although stringent observance of the by-law could hardly have failed to have disclosed the misdoings of the president and cashier for which it was sought to hold them responsible. It was considered sufficient by the courts that the manner of conducting the bank's business in that and other respects had been sanctioned by long-continued usage. * * *

"Nor can we find negligence on the directors' part clearly and unmistakably shown merely by the fact that they omitted to make the examination in the particular way which the District Court regarded as a necessary test required by ordinary considerations of precaution. It is difficult to see upon what principle a director can be held negligent merely for omission to perform an act not usual and not known by him to be necessary or important, especially in the absence of anything suggesting inquiry as to its necessity or importance. What was regularly done at the examinations made appears from the quotation in the opinion below from the master's report; and it proved insufficient for the purpose of bringing to light that which would have led to discovery of Coleman's practices in that, as the opinion below states, 'they took the amount due to the depositors on the cashier's ledger as correct, which was in fact incorrect by the amount of Coleman's stealings.' Speaking generally of the directors, there had been nothing to put them on inquiry or cause them to suspect that the amount shown by the cashier's ledger as due depositors might be inaccurate and might therefore require verification by such additions of figures on the depositor's ledger, and we cannot hold their reliance upon the cashier and his ledger for a correct showing of said amount to have been clear and unmistakable negligence. The amount so taken by them as correct, as the master found, would be and apparently was verified by the cashier's showing of expenses paid, investments made, cash on hand and deposited with other banks.

"As, in view of Briggs v. Spaulding, 141 U. S. 132, above cited, we could not hold mere non-observance of the by-law to be a proved failure in performance of a duty required of the defendants as directors, we cannot hold the above failure on their part to go behind the figures given them by the cashier on his ledger of itself to be a proved negligent failure in due performance of their duties. Such action on their part would have been 'a measure of unusual precaution, not imperative when there was no reason to distrust the integrity or efficiency of the cashier'; and directors, as has been held, are 'not to be deemed remiss because they did not resort to exceptional methods, or because they relied upon the cashier's supervision over the books and accounts or because they reposed confidence in his reports of the amount and other clerical details of the assets and liabilities.' Warner v. Penoyer, 91 Fed. 587, 591.

"If any examination of the bank by the national examiners has since been made to appear in any respect inadequate in the light of the discoveries made as above by the expert accountant, each of them appears to have been at any rate much more thoroughgoing than any of the directors could have been expected to make without expert assistance. That such examinations were made twice in each year, and without discovering anything wrong in the bank's condition or bookkeeping, the directors knew, and that fact affords still another reason for believing that they were going along under a feeling of security, and with no cause to suspect wrongdoing or irregularities;

a reason which tends to forbid the conclusion that the directors are shown to have clearly and unmistakably failed in the ordinary care due from them, merely by their omission as above to make more regular and more searching examinations themselves.

"Nothing in the evidence tends to show that the examinations of the kind held necessary by the court are, or have ever been, usually recognized or understood as part of the regular duties which directors of such a bank as this are expected to perform, nor is any such duty required by any rule of law. Judging these directors as they are entitled to be judged, in the light of all the circumstances present to their minds at the time, as businessmen of average business abilities and accomplishments, with no pretensions to instinctive foresight or expert training in respect to bank bookkeeping, we are unable to believe that their omission to make such examinations on September 30, 1907, or thereafter, in the absence of notice of special necessity therefor, clearly proves negligence on their part. * * * Under a familiar principle in determining the question whether evidence was so clear as to justify rejecting the master's findings against negligence, reference must be had to the situation which surrounded the directors at the time of the alleged omissions of duty and before the wrongs of Coleman had been discovered and exposed, rather than by reference to the situation afterwards discovered and exposed by experts. 1 Thompson on Law of Negligence, Par. 28. The character of after-discovered conditions might be such in a given case as to tend to show negligence, yet fall short of making it

clear and unmistakable; and again, they might be such as to have very little, if any tendency to show negligence."

Upon this same subject the Supreme Court of the United States, on the appeal, said, 251 U. S. 528:

"In this connection it should be mentioned that in the previous semi-annual examinations by national bank examiners nothing was discovered pointing to malfeasance. The cashier was honest and everybody believed that they could rely upon him, although in fact he relied too much upon Coleman, who also was unsuspected by all. If Earl had opened the envelopes from the clearing house and had seen the checks, or had examined the deposit ledger with any care he would have found out what was going on. The scrutiny of anyone accustomed to such details would have discovered the false additions and other indicia of fraud that were on the books. But it may be doubted whether anything less than a continuous pursuit of the figures through pages would have done so except by lucky chance. The question of the liability of the directors in this case is the question of whether they neglected their duty by accepting the cashier's statement of liabilities and failing to inspect the depositors' ledger. The statements of the assets always were correct. A by-law that had been allowed to become obsolete, or nearly so, has been invoked as establishing their standard of conduct. By that a committee was to be appointed every six months 'to examine into the affairs of the bank, to count its cash, and to compare its assets and liabilities with the balances on the gen-

eral ledger for the purpose of ascertaining whether or not the books are correctly kept and the condition of the bank in a sound and solvent condition.' * * * We are not prepared to reverse the finding of the master in the Circuit Court of Appeals that the directors should not be held answerable for taking the cashier's statement of liabilities to be correct as the statement of assets always was. If he had not been negligent without their knowledge it would have been. *Their confidence seemed warranted by the semi-annual examinations by the government examiner,* and they were encouraged in their belief that all was well by the president, whose responsibility as an executive officer, interest as large stockholder and depositor, and knowledge from long daily presence in the bank, were greater than theirs. They were not bound by virtue of the office gratuitously assumed by them to call in the passbooks, compare them with the ledger, and, until the event showed the possibility, they hardly could have seen that their failure to look at the ledger opened the way to fraud. See, Briggs v. Spaulding, 141 U. S. 132, 35 L. Ed. 662; Warner v. Penoyer, 44 L. R. A. 761, 91 Fed. 587."

It is to be remembered that the national bank examiners examined the Northwestern National Bank in the month of September, 1926, at a time when the Wheeler float was reaching stupendous proportions, and yet the existence of the float was concealed from the national bank examiners as it was concealed from the examining committee by removing the dishonored McCormick Lumber Company checks from "cash items" and substituting new checks which were then sent for collection

to the eastern banks upon which they were drawn, and thus concealed in "items in transit".

Again, counsel quotes from Briggs v. Spaulding, 141 U. S. 168 (Brief, page 116), but with a degree of negligence far less excusable than that with which he charges the defendants in this case, counsel for the complainants *neglects to inform the Court that he is quoting from the* DISSENTING OPINION *and not from the opinion of the Court.*

The law laid down by the Supreme Court in Briggs v. Spaulding, and which has never been reversed, is as follows:

> "The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common-law rule which renders every agent liable who violates his authority to the damage of his principal. A statutory prohibition is material under these circumstances merely as indicating an express restriction placed upon the powers delegated to the directors when the corporation was formed.'
>
> "It is perhaps unnecessary to attempt to define with precision the degree of care and prudence which directors must exercise in the performance of their duties. The degree of care required depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances.

They are not insurers of the fidelity of the agents whom they have appointed, who are not their agents but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents. Morawetz, Par. 551, et seq., and cases.

"Bank directors are often styled trustees, but not in any technical sense. The relation between the corporation and them is rather that of principal and agent, certainly so far as creditors are concerned, between whom and the corporation the relation is that of contract and not trust. But, undoubtedly, under circumstances, they may be treated as occupying the position of trustees to cestui que trust.

"In Percy v. Millaudon, 8 Mart. N. S. 68, which has been cited as a leading case for more than sixty years, the Supreme Court of Louisiana, through Judge Porter, declared that the correct mode of ascertaining whether an agent is in fault 'is by inquiring whether he neglected the exercise of that diligence and care, which was necessary to a successful discharge of the duty imposed on him. That diligence and care must again depend on the nature of the undertaking. There are many things which, in their management, require the utmost diligence, and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible

for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks, from the nature of their undertaking, fall within the class last mentioned, while in the discharge of their ordinary duties. It is not contemplated by any of the charters which have come under our observation, and it was not by that of the Planters' Bank, that they should devote their whole time and attention to the institution to which they are appointed, and guard it from injury by constant superintendence. Other officers on whom compensation is bestowed for the employment of their time in the affairs of the bank have the immediate management. In relation to these officers, the duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge, to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them re-responsible."

The Supreme Court then proceeds to quote with approval the language of Lord Hatherley in Land Credit Co. of Ireland v. Fermoy, L. R. 5 Ch. 763:

"Whatever may be the case with a trustee, a director cannot be held liable for being defrauded, to do so would make his position intolerable."

The Court then goes on to say:

"The doctrine that one trustee is not liable for the acts or defaults of his co-trustees, and while, if he remains merely passive and does not obstruct the collection by a co-trustee of moneys, is not liable for waste, is conceded, but it is argued that if he himself receives the funds, and either delivers them over to his associate, or does any act by which they come into the possession of the latter or under his control, and but for which he would not have received them, such trustee is liable for any loss resulting from the waste (Bruen v. Gillet, 115 N. Y. 10, 4 L. R. A. 529; Pomeroy, Eq. Jur. Par. 1069, 1081); and that this case comes within the rule as thus qualified."

"Treated as a cause of action in favor of the corporation, a liability of this kind should not lightly be imposed in the absence of any element of positive misfeasance, and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequences of omission on their part. * * *

"*Nor was there any violation of law in permitting him to conduct its business, for he was duly authorized to do so under the provisions of the Act.* We do not mean that this dispensed with reasonable oversight by the directors, but that belongs to a different branch of inquiry."

"But it is contended that defendants should have insisted on meetings of the board of directors or had special meetings called, and at those meetings or otherwise made personal examination into the affairs of the bank, and that had they done this they would have discovered the condition of the bank and prevented losses occurring subsequently to the 10th of January.

"Here, again, it should be observed that even trustees are not liable for the wrongful acts of their cotrustees unless they connive at them or are guilty of negligence conducive to their commission, and that Lee and Vought had long been directors. * * *

" * * * We are impressed by the evidence with the conviction that a cursory glance would not have been enough. * * *

"Certainly it cannot be laid down as a rule that there is an invariable presumption of rascality as to one's agents in business transactions, and that the degree of watchfulness must be proportioned to that presumption. 'I know of no law' said Vice Chancellor McCoun, in Scott v. Depeyster, 1 Edw. Ch. 541, 6 L. Ed. 239, 'which requires the president or directors of any moneyed institution to adopt a system of espionage in relation to their secretary or cashier or any subordinate agent, or to set a watch upon all their actions. While engaged in the performance of the general duties of their station, they must be supposed to act honestly until the contrary appears; and the law does not require their employers to entertain jealousies and suspicions without some apparent reason. Should any circumstance transpire to awaken a just suspicion of their want of integrity, and it be

suffered to pass unheeded, a different rule would prevail if a loss ensued; but, without some fault on the part of the directors, amounting either to negligence or fraud, they cannot be liable.'

"Nor is knowledge of what the books and papers would have shown to be imputed. In Wakeman v. Dalley, 51 N. Y. 32, Judge Earl observed in relation to Dalley, sought to be charged for false representations in the circular of a company of which he was one of the directors: 'He was simply a director, and as such attended some of the meetings of the board of directors. As he was a director, must we impute to him, for the purpose of charging him with fraud, a knowledge of all the affairs of the company? *If the law requires this, then the position of a director in any large corporation, like a railroad, or banking, or insurance company, is one of constant peril.* The affairs of such a company are generally, of necessity, largely intrusted to managing officers. The directors generally cannot know, and have not the ability or knowledge requisite to learn by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely trust to them. They publish their statements and reports, relying upon the figures and facts furnished by such agents; and if the directors, when actually cognizant of no fraud, are to be made liable in an action of fraud for any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its

agents, and he becomes substantially an insurer of their fidelity. It has not been generally understood that such a responsibility rested upon the directors of corporations, and I know of no principle of law or rule of public policy which requires that it should'."

Counsel also cites Chesbrough v. Woodworth, 195 Fed. 881. This case was appealed to the Supreme Court of the United States and was reported in 244 U. S. 72, and 61 L. Ed. 1,000. It has no application to the facts in the case at bar. It was an action at law brought by stockholders *who had purchased their stock relying upon the published statement of the condition of the bank made prior to the time of their purchase,* wherein the directors carried as assets paper of the Maltby Lumber Company twenty times greater than the amount which could be loaned under the law. Neither of the complainants here bought their stock relying upon any statement, published or otherwise, which was false or misleading, and has been pointed out before, they could not prosecute such a claim in this kind of a proceeding. The Court plainly stated: *"The damages in such a case are personal to the plaintiff. He sues in his own right and not for the association."*

Counsel also cites Jones National Bank v. Yates, 240 U. S. 559, 56 L. Ed. 788. In this action it was sought to hold the directors severally liable *to depositors who suffered damages* because of the false representations as to the bank's financial condition. It was there held that in such an action the testimony must prove that the violation of the statute with regard to financial reports must have been knowingly done and hence that

'something more than negligence is required; that is, the violation must in effect be intentional". Again we state that it is not claimed that the complainants were depositors who suffered any loss by reason of any statements made by the board of directors, nor is there any evidence that the statements made were false, let alone that they were knowingly false.

The decision in Bowerman v. Hammer, 250 U. S. 510, in no wise enlarges the liabilities or increases the duties of directors as defined in Briggs v. Spaulding, Rankin v. Cooper, and Bates v. Dresser, heretofore mentioned. Bowerman had been elected a director of the bank and had not attended a single meeting of the board of directors and wholly abrogated the duty of supervision and control which rested upon him as a director. The court therefore properly held that he was guilty of common law negligence and that his claimed ignorance as to the bank's condition was the result of gross inattention in the discharge of his voluntarily assumed and sworn duty. These defendants not only attended the regular and special meetings of the board of directors but freely and continuously gave their time and attention to the bank's affairs and unless they are to be held liable for lack of omniscience and instinctive foresight, they cannot be here held liable.

We find it necessary to correct certain statements of counsel with regard to the Wheeler float. On page 51 of his Brief, he relates the testimony of the witness Decker, who had charge of the collection department of the bank, that when the examining committee was looking into the bank's condition the cash items were listed

in the usual way and were handed over to Mr. Fraley, the auditor, that he might go over them with the examining committee. Counsel has overlooked the fact that when the examining committee came into the bank to make their required examinations, the McCormick items had been removed from the cash items and that new checks of the McCormick Lumber Company deposited in lieu thereof, which were then in "items in transit", unsegregated, unnamed, and there was no means whereby the examining committee could ascertain their existence except by writing to their correspondent banks through whom they had been sent for collection, and that neither Decker, Young, Fraley, or any officer or employee of the bank ever informed the members of the examining committee of the existence of such items or the fact that the McCormick Lumber Company items were continually being dishonored. The examining committee did, however, follow the practice of obtaining letters of verification that the gross amount of items claimed to have been sent to them and in transit on the day of the examination had in fact been so sent. Indeed, unless the attention of the examining committee was specifically invited to the fact that this course of crediting checks which would ultimately be dishonored was in existence, no check or audit, unless it be a continuous one over a long period of time, would have revealed its existence. Wheeler and Olmstead concealed this practice not only from the examining committee but also from the national bank examiners when their official examinations were made.

On page 84 of complainants' brief, counsel requests the court to note, and has italicised, an extract from the Wilde report of March 25, 1926, that "The McCormick Lumber Company protested checks, and Wheeler-Olmstead Company protested checks, both carried as cash items, were eliminated during the examination, having been taken up by J. E. Wheeler and the McCormick Lumber Company." These items, however, were not a part of the so-called float but were checks of the two companies in question which had been deposited to the account of J. E. Wheeler and, as the examiner states, had been taken up during the examination by Mr. Wheeler and by the McCormick Lumber Company. It is fair to assume that if those matters were indicative of dishonesty or violation of the banking laws, the examiner in question would have plainly so stated and directed the attention of the board of directors thereto.

On page 85 is the statement that the auditor of the bank, Fraley, called the attention of the examining committee to the very things alleged in the complaint. If counsel by that refers to the McCormick Lumber Company float, we have this to say: that the testimony does not contain any such statement from the lips of Fraley, or any other witness.

Counsel has attempted to make capital out of the fact that the bank published the report of its condition in the month of March, 1927, and at approximately the same time wrote the Comptroller admitting a total impairment of capital.

As we have indicated before, even though this were true, it would avail the complainants nothing for the

reason that they neither bought stock nor suffered a deposit loss by reason of such statements.

As a matter of fact, however, there is no actual discrepancy between the published statement and the letter to the Comptroller. The report of the Examiner showing the impairment did not take into consideration the one hundred percent assessment which had been guaranteed by responsible and substantial stockholders, while the published report gave due and proper consideration to that fact.

Therefore the payment of an assessment of one hundred per cent. on the capital stock having been guaranteed by responsible stockholders, the board of directors were justified in their pubilshed statement in March of an unimpaired capital.

On page 87 we find the capitalized statement that every one of the defendants testified that the Wheeler matter was left to Olmstead. The evidence shows that the directors discussed the matter and instructed Olmstead to bend his efforts to liquidate the Wheeler indebtedness; that director Collins personally conferred with Olmstead and Wheeler upon the matter and that the Wheeler line of credit received continuous general consideration from the board of directors at practically every one of its meetings.

On page 95 is found the statement that "while knowing and having cause to inquire for further knowledge, they allowed cash items of more than two hundred thousand dollars in July, 1926, as fictitious credits in the transactions of the bank, to which the attention of Price was then specifically drawn, to grow and increase

through August and the rest of the summer until Skinner's previous, as well as his specific attention on February 10, 1927, was directly called to about and over $800,000 of such cash items outstanding." There is not a shred of testimony showing knowledge on the part of any of the directors of such cash items with the exception of director Price, and that is specifically denied by Price and rests solely upon the unsupported word of Olmstead, and is so incredible, illogical and unlikely that it can have no probative weight.

Complainants specify error in the action of the court in quashing service of summons and dismissing the suits as to the defendant McCormick. The complainants are both non-residents of the District of Oregon. McCormick is a resident of Illinois and was there served with process. Under Section 51 of the Judicial Code, Sections 112 to 118 inclusive, U. S. C. A., no civil suit shall be brought in any district court against any person by any written process or proceeding in any other district than that whereof he is an inhabitant, but where jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or defendant. As the trial court held, the sections in question "have reference to states containing more than one district, or containing more than one division, or where receivers are appointed of lands or other property of fixed character, or suits to enforce legal or equitable liens upon or claims to, or to remove an incumbrance or cloud upon the title of real or personal property within the district in which the suit is

brought. None of the cases cited by counsel have any applicability to proceedings such as these. These proceedings are based upon an alleged violation of either the common law or statutory duties of a director. There is no *res* involved; no property, either real or personal, which the court has any right to take possession of and administer. These suits, therefore, are not suits to enforce a lien on real or personal property, to remove a cloud of incumbrance thereon, but are *in personam*. If jurisdiction is asserted because a federal question is involved, then under the sections in question McCormick can be sued only in the district of which he is an inhabitant.

Rose's Federal Procedure, 280;
Macon, etc., v. Atl. Coast Line, 215 U. S. 501.

If jurisdiction is founded upon citizenship alone, the defendant McCormick cannot be compelled to submit himself to the jurisdiction of the District Court of Oregon in a suit brought by non-residents by serving him in the district of his own residence.

Camp v. Gress, 250 U. S. 308;
Robertson v. Railroad Labor Board, 268 U. S. 619, 69 L. Ed. 1119;
Foster's Fed. Prac., 6th Ed., Sections 61-B and 61-C;
Bunn, U. S. Courts, p. 117.

Not only has this specification no merit of its own but in view of the fact that the bill is without equity, it does not merit further consideration.

With all courtesy and consideration for counsel, we are compelled to say that much of the brief filed is taken up with matters the point of application of which we cannot understand. We have endeavored to sift out from the brief and from the record the actual issues of law and fact and to present them fairly and fully to the court.

The defendants in this case have never had any desire to, and know no reason why they should, conceal any fact, or seek to avoid any proper responsibility. In their long course as directors of the Northwestern National Bank they diligently and honestly endeavored to fulfill the duties which they assumed. The condition in which the bank found itself was in no manner the result of inattention, negligence, or mismanagement on their part. They had pursued a constructive policy with regard to the bank's affairs from the moment that deflation had "frozen" a substantial amount of the bank's loans and discounts. They had devoted every penny of the bank's earnings, which were large, to the removal of unsatisfactory assets and to writing off losses as and when they were ascertained.

When in the judgment of the Comptroller, it was thought wise to hasten the removal of "frozen" assets, under his direction and with his approval they had laid plans, and were actively engaged in their execution for the formation of a holding company which would not only take the non-income producing loans from the bank, but which would vastly increase its income. These plans would have been consummated and the bank would still be one of the active and prosperous banking

institutions of the northwest, had it not been for the criminal acts of Wheeler and Olmstead which brought about the Wheeler crash. The policy which the directors pursued had the approval of both the bank examiners and the Comptroller. It failed through no fault of theirs. Being unaccused by their own consciences of any fault other than possible errors in judgment, to which all mankind are prone, they confidently expect the affirmance of the decree of the trial court which after patiently giving to the complainants the utmost scope in the presentation of their evidence, acquitted these defendants of any wrong doing.

Respectfully submitted,

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of Counsel.

No. 5874

IN THE

United States Circuit Court of Appeals

IN AND FOR THE NINTH JUDICIAL CIRCUIT
IN EQUITY

CHARLES A. BURCKHARDT,
vs.
NORTHWESTERN NATIONAL BANK, et. al.,
Respondents.

FRED A. BALLIN,
Appellant,
vs.
THE NORTHWESTERN NATIONAL BANK, et. el.,
Respondents.

Reply Brief of Appellants

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Reply Brief of Appellants

The Court kindly granted leave to the Appellants for reply brief to meet the matters on oral argument and in the brief of Respondents.

The cases made on appeal are both accounting cases, and there has never been any deviation. It is, therefore, an untrue and designed statement to say that the cases were brought to prevent the collection of debts in which respect these same directors for the bank, through their attorneys, defied the primary jurisdiction of the Federal Court and sought by attachment process in the State Court to collect the amount of their respective demands against complainants, ***within the period that there was time to take this appeal;*** and to save their property the complainants paid, believing that equity would ultimately prevail.

So it is manifestly unfair for the respondents to present any such misstatements now to the Court. Paragraph 22 of the Ballin bill, Record, page 191, and Paragraph 21 of the Burckhardt Bill, Record, page 28, fully disclose the record.

It is constantly reiterated that Olmstead did not appear by counsel. On the contrary his counsel did appear and took part in the case by their personal presence; but they did not join in with the other defendants, nor adopt their tactics.

The appellants presented upon the argument that as early as the year 1925 the bank situation was considered acute and was so pointed out to these respondents by the officers of the Treasury Department of the United States; and yet these officers and directors who are the defendants in this case, persisted in the same inactive policies and carried those policies on to the point of destruction of the bank, as the evidence shows.

The brief of respondents, pages 28 and 29, as well as the statements of Mr. Hart on oral argument, particularly assert ***that no one knew or had cause to know or means of notice of the stupendous transactions of Wheeler through this bank extending over a period of years,*** and that the time subordinates learned thereof ***was indefinite in the record.*** On this matter of knowledge and notice on the part of Skinner, Stewart and Price, and upon the part of Metschan, Charlton and Spaulding, there is no doubt whatever in the record.

It will be seen that the Examining Committee in 1924, with what they denominate as meticulous care, were specifying items and calling specific and particular attention of the Directors as the Examining Committee to what they wished done. It is noticeable that upon November 18, 1925, the Comptroller was telling them what to do and they disobeyed, and that this meticulous care fell off and their inaction commenced as Directors, Examining Committee and Executive Committee and even as officers ***following October 9, 1924.***

The statement embodied in the record commencing at page 331 of Volume I is chronological and the Court will be aided immensely by reading the actual record facts from the bank's own papers of what these men did and did not do, according to their own minutes.

In these aspects, too, we must remember that the appellants had to seek information from their trustees and officers of this bank, and that in order to make such case as was made, every fact had to be drawn out to meet the contrary theories of the criminal case tried by the same Court, and the constant bickering and contentions of counsel ***that evident facts had to be otherwise interpreted than they actually were.***

The concluding clauses of each of the bills of complaint are substantially similar and pray for the taking of the account, and reasons why and for the restraint of the defendants in their acts and doings, and that they be required to do the things that will enable equity to grant relief. Record, pp. 28 to 33 for Burckhardt Complaint, and Record, pages 190 to 195, for Ballin Complaint.

It will be remembered that the only source complainants could get testimony or information from in any way whatever would be the bank officials, these directors and their officers, who will not be permitted to say now: "We did what was right and nobody can question what we did or examine into how we did it." See main brief *Jones v. Yates*, 240

U. S. 563, at p. 112 of the brief, and *Thomas v. Taylor*, 224 U. S. 82, top of p. 113 of the brief.

We respectfully submit that the record shows on this ***question of notice and means of notice and knowledge***, the following important things:

At page 371, as reported by Directors Spalding, Metschan and Charlton, that October 14, 1924, they found slow loans in the bank which then amounted to more than $3,600,000.00, and there were $2,000,000.00 of combined loans in the bank whose balances were not compensating.

At page 384, top of the page, impairment of capital suggested by the Treasury Department, November 18, 1925.

At page 575, HOYT, July 1926, $81,000.00, "Cash Items."

HOYT, August 13, 1926, $218,770.00. "Cash Items."

At page 576 are the questions of the Court to HOYT, and his answers.

At Record, pp. 579 to 581, is the testimony of YOUNG. Page 580, Cash Items, November 10, 1926, $499,967.97.

At page 580, these Cash Items on November 19 to December 7 (compare Record, p. 411), were on

November 19, as to Sundry Banks, $1,833,084.44, Bills in Transit, $53,097.16, Cash Items, $20,731.44, and on December 7, the Sundry Banks were $1,713,-930.38, Bills in Transit were $84,664.89, and Cash Items were $105,699.89.

By reference to the Record, p. 411, we find the statement of Spaulding, Metschan and Charlton, under date of December 7, 1926, to the Board of Directors, as Examining Committee of this bank.

At page 589, top of page, and top of page 591, FRALEY shows what composed the complainants' Exhibit 29, constituting the memorandum given by him to the Examining Committee, November 19, 1926, the terms of part of which he describes at face, page, Record, 588. The exhibit speaks for itself.

At page 594, top of page, FRALEY testified that on the 30th of August, 1926, he made a list and supervised Mel Young, the bookkeeper, and that he thought Bates had his own list, and ***that any officer or director had access to the books just the same as he did and had they investigated the records, they could have ascertained and known in July, 1926, just what he knew.***

FRALEY confirms the amount of "Sundry Bank Items," Record, p. 593.

At page 613, OLMSTEAD, in July, 1926, discussed it with Price, and Price does not deny it, either.

At Record, p. 577, BATES shows that Price, Skinner and Stewart were informed in July, and also, later in the fall.

Contrast the foregoing with the sworn statements of LONGSHORE who was Assistant Vice President. See the Record at page 500, where the guarantee of June 8, 1926, is referred to, made by Wheeler, at that time for the full ten per cent. of capital surplus and advances to McCormick Lumber Company are specifically referred to. Next, examine his testimony, middle of page 506, and top of page 507, and note the carefulness of the witness not to hurt anybody, and then read in that connection top of page 524.

Now, a word about the concealment, ***and if there was concealment, then all the more reason for accounting:*** The examination of the testimony of Bookkeeper YOUNG in the Record, p. 579, virtually enables the Court to see at a glance exactly what was done. As well expressed by Presiding Judge Dietrich at the hearing, we know there is some $13,000,000.00 —according to the testimony—to account for, and some $12,000,000.00 that was handled in some manner as a comeback, leaving a million discrepancy so far as the mere Wheeler transactions were concerned, regardless of any other feature of the case. So a segregation of the way these accounts were kept in their three aspects of "Sundry Banks," "Bills in Transit," and "Cash Items" as described by the witnesses were found in the records of the bank and exhibited at pp. 579 to 581.

It is observable at the time that HOYT speaks, that on July 12 HOYT fixes the amount of "Cash Items" handed to him in a list by BATES, and there is then shown on the books of the bank, July 12, 1926, $238,510.97, and the Court's attention is called to the statement of "Sundry Banks" on that date, which is found much lower by the enormous amount of nearly half a million dollars than it was on November 16, 1926.

We proceed into August, and we find on August 30, 1926, when the other subordinate officers and BATES and HOYT and WALTER BROWN and JONES talked about what they heard or saw or was rumored, the amount is given as $254,825.49, and on those last days in August, there are ***no "Sundry Bank Items"*** at all. On July 23, 1926, there are ***"no Sundry Bank Items" at all.*** When we come into September 14 and 15, there is nothing but "Sundry Banks" and from September 24, 1926, to November 9, ***there is nothing but Sundry Banks.*** Then very significantly, November 10th and 13th, six days before the so-called Examining Committee made any investigation at all, there were several days that there were no Sundry Bank Items whatever. We find some nearly $700,000 worth of "Cash Items," when we add the column at page 580 on the Cash Items side. Then we find that the items drifted down from that side and increase on the "Sundry Bank side," and that there was absolutely a difference of some $200,000.00 in the Sundry Banks between the close and the beginning of January 3, 1927,

which is obvious, on pp. 580 and 581 of the Record under that date, and there are no Cash Items significantly from January 3 to February 11, 1927, then we find entered $169, 132.16. But respondents say, then, Jones found and they found, $792,962.00 themselves.

Now, as indicated by the Presiding Judge on argument, the $13,000,000.00 must have been accounted for in the course of the transactions or the bank's cash would have been short, because the witnesses state that these Cash Items had to be taken into consideration in determining the bank's money volume to do business. Hence it was a matter of every morning's examination by everybody to know what cash the bank had.

It is therefore perfectly obvious that by the system that carried over a period of months "***Sundry Banks***" showed a constantly inviting source of information as to why they should so enormously fluctuate. It was not natural to carry these one time by directing the bookkeeper to put them into bonds and judgments and again for Skinner to direct them to put them into Banks and other Sundries. ***It is not consistent with the claimed assertion of concealment.***

At the foot of page 64 of Respondents' Brief we find them state that concealment prevented discovery. What the Record shows about substituting checks so as to conceal in September does not accord with the statement that their purpose was to ascer-

tain what their situation was so as to lay the foundation for a corporation and get at the bottom of the affairs so an assessment could be predicated. Nor does it accord with the statement that all of the employees in the bank would falsify their records and books or even that they had to do it to conceal what is now claimed to be Olmstead's misapplications.

It is a demonstrable fact from the Record that carries its own uncontradicted conclusion that these records as kept by these several subordinate officers ***were open and observable so every other person in the bank could know just what those subordinate officers knew and they all knew it and the tabulated entries, Record, p. 580, running from September 21 to October 30, indicate it conclusively.***

To emphasize, we find that impairment was suggested, Record, p. 384, as early as November 18, 1925, by the Comptroller.

Mr. Hart said in his argument that the purpose of the Harris investigation, September 21, 1926, was to find out about the organization of some entity to take over frozen assets, but the Examiner, as shown upon Appellant's Brief, p. 29, wrote significantly about the very items alleged in the bills: "LENIENT CREDIT POLICIES WHICH HAVE NOT ONLY RESULTED IN HEAVY LOSSES BUT HAVE CARRIED THIS INSTITUTION ENTIRELY BEYOND ITS LEGITIMATE FIELD OF BANKING AND MADE IT A PARTNER AND IN SOME INSTANCES SOLE OWNER OF OTHER BUSINESS

WHICH IT NOW DIRECTLY OR INDIRECTLY OPERATES." (Then he refers to many items that are alleged in the complaint.) "THE FOREGOING ITEMS AGGREGATE MORE THAN $1,500,000.00 AND ARE INVESTMENTS WHICH YOUR EXAMINER CONSIDERS AS ENTIRELY OUTSIDE THE PURPOSE FOR WHICH BANKS ARE CHARTERED." (Record, Vol. 2, p. 478.)

Skinner admitted on the stand that the plan which was under consideration involved the taking out of $1,500,000.00 of assets. (Record, p. 484.)

Answering Mr. Hart's statement as to the cause of knowledge and what they knew and should have known, please note the letter as early as November 17, 1925 (Record, p. 382), written by the Comptroller to the Directors, in which, at the top of Record, p. 385, he states:

> "THE REPORT SHOWS, AS PREVIOUS REPORTS HAVE SHOWN, THAT MANY LARGE LINES OF CREDIT TO AFFILIATED INTERESTS ARE STILL IN THE BANK. IT IS REMEMBERED THAT TO SOME EXENT THESE LINES ARE THE RESULT OF ADDITIONAL ADVANCES MADE TO WORK OUT LOANS ALREADY UNDESIRABLE, BUT THEIR ADVERSE EFFECT UPON THE CONDITION OF THE BANK IS FELT NEVERTHELESS.
>
> IT IS THOUGHT THAT THE CONDITION OF THE INSTITUTION IS MORE SERIOUS THAN THE DIRECTORS WILL PERMIT THEMSELVES TO BELIEVE."

Please note that April 6, 1926, still answering Mr. Hart, the Comptroller writes to these directors, Record, p. 393:

> "YOU, OF COURSE, UNDERSTAND THAT YOU CANNOT BE PERMITTED TO CARRY INDEFINITELY DOUBTFUL ASSETS AND SHOW AND REPORT THEM AS GOOD.
>
> "AN EXHAUSTIVE REVIEW OF PAST REPORTS AT THE TIME OF PREVIOUS EXAMINATIONS FORCED THE CONCLUSION THAT THE CONDITION OF YOUR BANK IS MORE SERIOUS THAN THE DIRECTORS AND MANAGEMENT BELIEVE AND THE CURRENT REPORT BEARS OUT THAT CONCLUSION. UNLESS, THEREFORE, THERE IS A DECIDED CHANGE FOR THE BETTER BY THE TIME OF THE NEXT EXAMINATION IN THE CHARACTER OF ASSETS CLASSED AS SLOW AND DOUBTFUL IN THE LAST REPORT, IT WILL BE NECESSARY TO PLACE THEREON MUCH LOWER VALUATIONS THAN HAVE BEEN GIVEN IN FORMER REPORTS, AND THIS, OF COURSE, WILL NECESSITATE A HEAVY ESTIMATE OF LOSSES."

Further answering Mr. Hart, the report of the Examiner addressed to Olmstead as of September 21, 1926, but really in a letter of October 22, 1926, Record, p. 401, contains the items many of which were listed in the bills of complaint, which showed in the recapitulation on page 406 of the Record, an aggregate non-bankable amount greater than the capital and surplus and undivided profits of the

bank, as the Court was informed by the Appellants on the oral argument, which, then, Mr. Hart disputed as incorrect. And this was a matter for special comment as pointed out in the argument by the Federal authorities in a letter to the Directors, December 2, 1926, Record, pp. 408-410.

The agreement which as near as the date can be fixed was the 2nd of March (Record, p. 459), in the year 1927, especially stated that the bank "BEING IN AN INSOLVENT CONDITION CANNOT BE PERMITTED TO CONTINUE TO OPERATE UNTIL ITS SOLVENCY HAS BEEN IN SOME MANNER RESTORED."

Again at Record, p. 464, in the controversy about the entries on the books concerning the bank building, the trial Court took part in the examination of the witnesses, while Mr. Hart was attempting to explain, and made the following statement: "IT LOOKS FROM WHAT I CAN GATHER THAT THEY SIMPLY SWELLED THE ASSETS $310,000.00, AND IN ORDER TO GET THE $310,000.00 INTO PROFIT AND LOSS-BOOKKEEPING." And to this the witness Skinner, one of the defendants and vice president, answered: "THAT IS CORRECT."

The Court repeated the question again at Record, p. 464, and finally the witness so answered again; and thus emphasized, Mr. Hart let the matter alone. (Vol. 2, p. 464.)

Skinner, himself, produced the Wylde Report, showing that March 25, 1926 (Record, p. 475), the so-called Wheeler Line described by all of the witnesses as the total of the items shown in the Wylde Report, aggregate $802,365.28. (See, also, Record, p. 477.)

On the 5th day of March, the Examiner Harris informed the directors that, among other things, their capital was impaired, as all along it had been impaired, and yet on March 23rd, 1927, they, these same respondent directors, issued a published bank statement to their stockholders and depositors, that the capital and surplus and undivided profits of this bank were unimpaired and of the same amount as at the last call, or substantially like thereunto.

YET ON THE ELEVENTH DAY OF FEBRUARY, NINETEEN TWENTY-SEVEN, THEY ALL SWEAR THAT THEY ALL KNEW OF THE MISAPPLICATION OF FUNDS OF THIS BANK BY WHEELER AND OLMSTEAD FOR WHICH THEY AS WITNESSES APPEARED IN THE CRIMINAL CASE TO ESTABLISH, AND UPON THIS EVIDENCE, OLMSTEAD AND WHEELER WERE EACH CONVICTED. HOW UNDER THE LAW CAN THESE RESPONDENTS KNOW A THING IN FEBRUARY AND YET IN MARCH ASSERT THE VERY OPPOSITE OF THE FACT THEY SWEAR THEY KNEW IN FEBRUARY?

They also told and published to the world in The Oregonian on March 1st, 1927, that the Pittock es-

tate had acquired a larger interest in the bank and that Mr. Price had been made president and that the bank would continue as one of high responsibility with these same directors. (Record, p. ...)

UPON WHAT SPECIES OF MENTAL LEGERDEMAIN DOES THE PRESENT LAW DEPEND IN ADMINISTERING THE AFFAIRS OF THESE QUASIPUBLIC INSTITUTIONS if such a situation is to be countenanced?

IF IT WAS NECESSARY IN 1925 TO CONSIDER AS THE COMPTROLLER OF THE TREASURY POINTED OUT, A VISIBLE AND EXPECTED IMPAIRMENT OF CAPITAL SURPLUS AND UNDIVIDED PROFITS, HOW CAN THE INACTION OF THESE RESPONDENTS BE SQUARED WITH THE DILIGENCE AND DUTY THE LAW EXACTS UNDER SUCH CIRCUMSTANCES?

In full support of the bills of complaint in this case and fully answering the oral argument of Mr. Hart as well as the matters put forth in brief by Mr. Maguire, the Circuit Court of Appeals for the Ninth Circuit in the recent case of *Adams v. Clarke,* 22 Fed. (2nd) 957, speaking through Mr. Circuit Judge Dietrich, at p. 959 (3) said:

> "AND APPARENTLY THE BANK IS CHARGEABLE WITH KNOWLEDGE DISCLOSED BY ITS RECORDS AND THE INFORMATION POSSESSED BY ITS DIRECTORS. *Curtis v. Connly, Supra.* BUT

HERE, DURING THE ENTIRE PERIOD IN QUESTION, DEFENDANTS NOT ONLY HELD A MAJORITY OF THE CAPITAL STOCK, BUT CONSTITUTED THE ENTIRE BOARD OF DIRECTORS. AS TRUSTEES IN EXCLUSIVE CONTROL OF THE BANK'S AFFAIRS, THEY CANNOT TAKE ADVANTAGE OF INACTION FOR WHICH THEY ALONE ARE RESPONSIBLE." (Citing many cases.)

Recently District Judge Sibley of the Northern District of Georgia, Atlanta Division, in the case of *Anderson v. Gailey*, 33 Fed. (2d) 589, at page 593 had these significant things to say:

"THIS, HOWEVER, WAS WELL KNOWN TO THE BANK EXAMINERS AND COMPTROLLER OF THE CURRENCY, AND SEVERELY CRITICIZED BY THE LATTER LONG BEFORE THE LIMITATION PERIOD. ANY ONE EXAMINING THE BOOKS AND SEEING THESE DEBTS RENEWED, WITHOUT REDUCTION, FOR YEARS, WOULD HAVE SUSPECTED SOMETHING WAS WRONG, ESPECIALLY IN THE FINANCIALLY TROUBLOUS TIMES WHICH PREVAILED DURING 1920 TO 1926 IN GEORGIA. **ANY INQUIRY WOULD HAVE DISCLOSED THE TRUTH.** ALL THE CASES REQUIRE DILIGENCE OF THE PLAINTIFF IN DISCOVERING THE RIGHT OF SUIT. IT IS TRUE THE DIRECTORS, ALTHOUGH STRANGERS TO THE BANK'S CREDITORS, **WERE IN A CONFIDENTIAL RELATIONSHIP TO THE BANK AND ITS STOCKHOLDERS, AND WOULD BE HELD IN STRICT GOOD FAITH AND MOST FULL DISCLOSURE IN**

DEALINGS BETWEEN THEM AND THE BANK OR ITS STOCKHOLDERS. (*Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232), AND THIS SAME RELATIONSHIP OF CONFIDENCE MODIFIES THE DILIGENCE REQUIRED OF THE BANK OR STOCKHOLDERS IN DETECTING OR DISCOVERING A FRAUD, AS WAS RECOGNIZED IN THE GEORGIA CASES CITED ABOVE."

The same excuses made upon argument in this case were made before Circuit Court of Appeals, Fourth Circuit, in the case of *Gamble v. Brown*, 29 Fed. (2d) 377, wherein among other things, at p. 371, that Court said:

"It is contended by the defendants, however, that, even if the examining committee had functioned, it could not have discovered the embezzlement of the notes by Dean. It is pointed out that K. B. Cecil, a bank examiner and expert accountant, made examinations of the bank in 1914 and failed to discover the shortage until his third visit. The bank examiner made three examinations—on February 10, August 7, and August 22, respectively. The shortage of notes was discovered as the result of the examination of August 7. Certain notes, which should have formed part of the assets of the bank, were represented by memoranda, indicating that they were in the hands of other banks for collection. Between August 7 and August 22, the examiner communicated with these banks and discovered that notes aggregating approximately $17,000, which were supposed to be in their hands, were not so held. Hence he returned on August 22 and closed the bank. A similar check was made by the examiner on February 10, but no short-

age was discovered. But it was possible for Dean at that time to have substituted in the note case, without detection, other worthless notes of the Farmers' Loan & Trust Company which he then had on hand. Such a substitution, however, could not have been made later on, when the notes would have matured. An auditing committee of the bank in the ordinary course would have checked the memoranda of notes in other banks for collection, precisely as did the examiner. The directors were culpable in this respect, and are liable to the bank for the losses which their neglect made possible. We think that the following comment of the special master was justified by the evidence.

"It cannot be urged that the fraud alleged to have been committed by H. H. Dean was so ingeniously devised and concealed that same would have escaped detection, had the directors been more vigilant, or had proper audits been made of the bank's affairs. The proof shows that the directors were not vigilant, or even careful, and that audits were not made. Had the directors prudently and carefully performed their duties, it is fair to presume either that Dean would not have attempted his dishonest practices, or that they would have been detected. The directors' indifference opened the way and Dean steppd into it."

Moreover, as in that case, so in this, there were times when the Discount Committee did not function, and the evidence shows here that the Examining Committee did not function. (Record, p. 481.)

(See, also, Record, p. 410.)

In *M'Cormick v. King*, Circuit Court of Appeals for the Ninth District, 241 Fed. 743, Mr. Circuit Judge Hunt had this to say:

> "**NO OTHER BANKER WAS CALLED UPON TO TESTIFY TO SUCH A CUSTOM, AND WE WERE DISPOSED TO LOOK UPON THE TESTIMONY AS BUT AN EFFORT OF ONE OVER-ZEALOUS TO HELP EXCUSE HIMSELF FOR HIS OWN CONDUCT IN THE PREMISES,** AND WHOSE EXCUSE IS INCOMPATIBLE WITH THE PRESUMPTION THAT BANK OFFICIALS WELL AND TRULY EXERCISE THEIR DUTIES AND KEEP WITHIN THE LIMITATIONS OF THE BY-LAWS WHICH HAVE BEEN REGULARLY ADOPTED."

> "IN THE NEXT PLACE, EVEN IF IT WERE TRUE TO AN EXTENT, SUCH A PRACTICE WOULD BE NO AUTHORITY FOR BANK OFFICIALS TO ALLOW CUSTOMERS TO OVERDRAW IN SUMS AND INCUR LIABILITY IN EXCESS OF ONE-TENTH OF THE AMOUNT OF THE CAPITAL STOCK OF THE BANK PAID IN. **FOR MONTHS BEFORE THIS BANK FAILED THE FREQUENT PAYMENT OF LARGE OVERDRAFTS MUST HAVE MADE IT APPARENT TO THE LOAN AND DISCOUNT COMMITTEE OF THE BANK, THAT, IF SUCH ACTS OF THE OFFICERS WERE CONTINUED, IT WOULD MEAN A SACRIFICE OF THE INTERESTS OF THE STOCKHOLDERS.** BUT THE PRESIDENT AND VICE PRESIDENT AND CASHIER WENT ON IN THE PRACTICE OF DEPARTURE FROM DUTY, AND SUSPENSION FOLLOWED."

"WE CAN THEREFORE REACH NO CONCLUSION **OTHER THAN THAT THE ACTS REFERRED TO WERE NOT MERE ERRORS OF JUDGMENT, BUT WERE IN GROSS MISMANAGEMENT OF THE BANK;** for which the defendants King and Andrews are liable under the general principles of the common law, as well as under the statutes heretofore quoted."

At page 746:

"WITH RESPECT TO DEFENDANT BOWERMAN, OUR OPINION IS THAT HIS LIABILITY IS ALSO TO BE MEASURED PRIMARILY BY THE RULES OF THE GENERAL LAW, AND THAT HIS WANT OF KNOWLEDGE OF THE GROSS MISMANAGEMENT OF KING AND ANDREWS WAS DUE TO SUCH INATTENTION TO THE DUTY WHICH WAS IMPOSED UPON HIM OF EXERCISING A REASONABLE SUPERVISION OVER THE CONDUCT OF THOSE IN CHARGE OF THE BANK THAT HE, TOO, IS LIABLE TO THE SAME EXTENT AS ARE KING AND ANDREWS, AND THAT DECREE SHOULD ACCORDINGLY GO AGAINST HIM. *Allen v. Luke* (C. C.), 163 Fed. 1018; *Williams v. Brady* (D. C.), 221 Fed. 118; ID. (D. C.), 232 Fed. 740."

That they were not doing a banking business, but were in the character of making partnership investments with other concerns, was deliberately characterized by the Examiner and he pointed out that they were not doing a banking business. Therefore, it suffices to say, that if anyone would look at the

Record, pp. 388 and 402, without prejudice, and with a fair and open mind, we find a list of an host of items appearing in the bills of complaint as far as the complainants could reasonably specify (Record, pp. 11 and 12, and Record, pp. 173 and 174), and they are confirmed by Examiner's Report and confirmed again by the Comptroller himself on p. 361 of the Record. Each supporting the allegations of the bills.

Lengthy quotations are made in the Respondents' Brief from the *Bates* case, pp. 56 and 63, but close examination shows the distinction and radical difference from the case at bar, save and except the application of by-laws upon which aspect the Bates case does agree with this. The dissimilarity rests upon the ground that every Director in this case or officer who was a Director in this case, was unlike those in *Briggs v. Spaulding*, or *Bates v. Dresser*. Olmstead, Stewart, Skinner and Price received large salaries (Record, p. 339), while Charlton, Metschan and Spaulding were specially paid (Record, p. 529), and Directors received daily compensation set forth (Record, by-law 19, p. 338, and as also top of p. 530 of Vol. II of the Record.) (Also, Record, p. 454.)

A still stronger reason that respondents ignore, rests in the documentary evidence itself where Phil Metschan in his letters as Director to Burckhardt, assured Burckhardt that everything was all right, and that he, Metschan, would protect his interests, and yet within three months, Metschan, knowing all

of the things that he knew, knew that the bank was headed for disaster. Olmsted's letters to Ballin and soliciting Ballin not to sell his stock, and Price's communication with Ballin by telegraph, all of which are in the evidence in exhibits, are indicative of the assurance of these people to the separate complainants, and furnish all the more reason for the respondents to account.

Again, Respondents deliberately overlook Exhibits 60 and 11, wherein Skinner, Stewart, Olmstead and others of these Directors and Officers invited Ballin and Burckhardt to join with them upon assurance of ***the situation denominating stock control***, and that the bank was all right, and therefore, the necessity of preserving it, when they knew it was not, furnishes written and documentary evidence again like the books of the bank of the necessity for these Directors to account for the performance of their fiduciary relation, all of them—***not Olmstead alone.***

It is not a case of single or individual import. The Corporation was entitled to have the necessary performance of duty to relieve it of disaster incurred by acts of these directors.

Will the Court, please, examine the Record at pages 418 and 419, and also, at pages 430 and 433, and again at pages 425 to 429.

With respect to this contingent liability of the stockholders (which the briefs of respondents at-

tempt to make it appear that these directors relieved them from, and that these defendant directors are to be commended for putting into the bank, that which they knew to be taken out), the Circuit Court of Appeals for the Ninth Circuit, speaking through Circuit Judge Gilbert, February 18, 1929, in the case of *Chase v. Hall*, 30 Fed. (2d) 195, at p. 197, said:

> "THE APPELLANTS CONTEND THAT THEY ARE NOT LIABLE FOR THE ASSESSMENT FOR THE REASON THAT THE DEBT IN THE INSTANT CASE WAS NOT INCURRED IN THE ORDINARY COURSE OF BUSINESS OR IN THE ORDINARY COUSE OF LIQUIDATION. WE CANNOT AGREE THAT THE EXECUTION OF THE NOTE WAS OUT OF THE ORDINARY COURSE OF LIQUIDATION. IT HAS BEEN HELD THAT WHEN A NATIONAL BANK ASSUMES THE DEBTS OF AN INSOLVENT BANK IN CONSIDERATION OF A TRANSFER OF A PORTION OF ITS ASSETS AND A NOTE FOR THE BALANCE, THE NOTE REPRESENTS THE CONTRACTS, DEBTS, AND ENGAGEMENTS OF THE INSOLVENT BANK FOR WHICH ITS STOCKHOLDERS ARE RESPONSIBLE. *Wyman v. Wallace*, 201 U. S. 230, 26 S. Ct. 495, 50 L. Ed. 738; *Hulse v. Argetsinger* (D.C.) 12 F. (2d) 933."

So, it is apparent in this case that the stockholders, complainants and others remain responsible by the acts of these directors, and have a right to know what became of the assets; and receive the values of their respective stock intrests decreed to them on the basis of what the true facts would show.

Respectfully submitted,

WILLIAM C. BRISTOL,
Attorney for Appellants.

September 21, 1929.

No. 5875

United States

Circuit Court of Appeals

For the Ninth Circuit.

NAVIGAZIONE LIBERA TRIESTINA, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL OF RECORD.

Messrs. BOGLE, BOGLE & GATES, Attorneys for Appellant, 611 Central Building, Seattle, Washington.

ANTHONY SAVAGE, Esquire, Attorney for Appellee, 310 Federal Building, Seattle, Washington; TOM DeWOLFE, Esquire, Attorney for Appellee, 310 Federal Building, Seattle, Washington. [1, 2*]

In the Northern Division of the United States District Court for the Western District of Washington.

No. 12,518.

NAVIGAZIONE LIBERA TRIESTINA, a Corporation,

Plaintiff,

vs.

HENRY BLACKWOOD, Acting United States Collector of Customs at the Port of Seattle, Washington, and UNITED STATES OF AMERICA, a Sovereign State,

Defendants.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

COMPLAINT.

Comes now the plaintiff above named, and for cause of action against the above-named defendants, and each of them, alleges:

I.

That at all of the times hereinafter mentioned, the defendant Henry Blackwood was, and now is, the duly appointed and qualified Acting United States Collector of Customs at the port of Seattle, Washington, and was at all of the times herein mentioned, and now is, acting in such capacity, and upon information and belief, that he is a resident of the said city of Seattle, State of Washington, and within the jurisdiction of this court.

II.

That at all of the times hereinafter mentioned, the United States of America was, and now is, a sovereign state.

III.

That at all of the times hereinafter mentioned, the plaintiff, Navigazione Libera Triestina, was and now is, the owner and operator of various motorships plying between ports of the United [3] States of America and ports of Italy, one of the said motorships being the motorship "Cellina," engaged in the business of carrying mails, passengers and goods for hire between the aforesaid ports, and that at the time of the commission of the alleged illegal act hereinafter referred to, there

were subsisting between the plaintiff and various individual shippers valid and binding contracts for the carriage for hire of various goods and commodities between the ports of the United States of America and the ports of foreign countries and return.

IV.

That at all of the times hereinafter mentioned, Giovanni Prigl was, and now is, the Master and in charge of the motorship "Cellina," and the one on board the said motorship to whom the immigration instructions hereinafter set forth were given subsequent to the arrival of the said vessel at the port of Seattle on or about the 17th day of March, 1927.

V.

That prior to the sailing of the said vessel from the port of Trieste, Italy, bound on a voyage therefrom to ports of the United States of America, and more particularly the port of Seattle, Washington, there were signed on board the said vessel, among others, as members of the crew thereof, and as *bona fide* seamen, Domenico Lachich and Constantino Camalich, citizens of the Kingdom of Italy and aliens to the United States of America; that the said Domenico Lachich and Constantino Camalich, and all of the remaining members of the crew of the said motorship "Cellina" signed on board the said vessel on the said voyage, were not voluntarily chosen and/or hired as members of the crew thereof, but were assigned to and sent on board the said vessel by the captain of the port of Trieste,

an official of the Kingdom of Italy, to fill vacancies in the crew of the said vessel, and that neither the plaintiff herein nor Giovanni Prigl, as Master of [4] the said motorship "Cellina" had, nor exercised any choice in the selection of the said Domenico Lachich and/or the said Constantino Camalich as members of the crew of the said vessel on the said voyage.

VI.

That heretofore and on the 17th day of March, 1927, the said Italian motorship "Cellina" arrived at the port of Seattle, Washington, from the port of Vancouver, British Columbia, a port foreign to the United States, with the said Domenico Lachich and Constantino Camalich then and there on board as members of the crew thereof. That prior to the arrival of the said vessel at the said port of Seattle, as aforesaid, the immigration authorities of the United States of America at the said port were duly and properly advised of the time and place of the arrival of the said vessel by its properly constituted agents, but in spite of such advices, properly and duly given, no representatives from the immigration service of the United States of America presented themselves, nor boarded the said vessel for the purpose of examining and/or inspecting the officers and members of the crew thereof upon its said arrival from Vancouver, British Columbia, as aforesaid, as required by the laws of the United States, and no representatives from the said United States Immigration Service presented himself, nor boarded the said vessel until

at or about the hour of 10:00 A. M. on the 18th day of March, 1927, at which time Inspector Rafferty of the United States Immigration Service at the said port of Seattle boarded the said vessel to inspect and examine the officers and members of the crew of the said vessel, in accordance with the provisions of Section 20 of the Immigration Act of May 26, 1924; that the said members of the said crew of the said vessel, and all of them, including Domenico Lachich and Constantino Camalich, were then and there mustered on the deck of the said vessel, willing and anxious [5] to be examined and inspected; that upon such inspection of the crew as was given by the said Inspector Rafferty, which plaintiff alleges was not a proper inspection as hereinafter set forth, a blanket notice to detain all of the members of the crew of the said vessel was then and there issued by the said Inspector Rafferty, and at the time of the said inspection of vessel, Giovanni Prigl; that at the time of the boarding of the said vessel by the said Inspector Rafferty, and at the time of the said inspection of said officers and crew of the said vessel, and at the time of the issuance of the said blanket detention order and service of the same upon the Master of the said vessel, Giovanni Prigl, all of the officers and members of the crew of the said vessel, including the said Domenico Lachich and Constantino Camalich, and constituting the entire personnel, were then and there on board the said vessel within the confines of the port of Seattle, State of Washington; that the said Giovanni Prigl, as Master of the

said vessel, upon being tendered the said blanket detention order, refused to accept the same and protested against the issuance of such an order detaining on board of said vessel all of the members of the crew of the said vessel; that the said blanket detention order was issued contrary to the rules and regulations of the Department of Immigration of the United States of America and/or of the laws of the United States of America applicable thereto; that thereupon the said Inspector Rafferty refused to issue any other supplementary or different order detaining any less than all of the members of the crew of the said vessel on board thereof, and then and there left and departed from the said vessel, asserting that proper and complete inspection and examination had been made of the crew thereof, and a proper detention order issued. Thereupon the members of the crew of the said vessel, including the said Domenico Lachich [6] and Constantino Camalich, were set to work at their various duties aboard the said vessel, and the said Domenico Lachich and Constantino Camalich were then and there directed and ordered to commence the work of scraping and painting the outside forward part of the said motorship, which work they, and each of them, then and there commenced to perform; that the said blanket detention order then and there issued and so served upon the Master of the said vessel by the said Inspector Rafferty, as aforesaid, constituted and was a detention order issued subsequent to an alleged inspection and examination of the crew of the said vessel, and was intended by

said United States Immigration Service and construed to be by the Master of the vessel as the final, conclusive, and only order detaining members of the crew of the said vessel thereof subsequent to its arrival from a foreign port, although its issuance was contrary to the rules and regulations of the United States Immigration Service and the laws of the United States applicable thereto.

VII.

That thereafter, and during the stay of the said vessel at the port of Seattle, Washington, and in spite of every effort and care on the part of the Captain, officers, and agents of the said vessel, the said Domenico Lachich and Constantino Camalich escaped therefrom, and their whereabouts became, and remain to be, unknown to plaintiff herein and/or the owners, officers and agents of said vessel.

VIII.

That the members of the crew and seamen of the motorship "Cellina" were not given a fair, or any, hearing prior to the issuance of the said blanket detention order detaining all of the members of the crew of the said vessel thereon; that the said members of the crew and seamen of the said vessel, and more particularly the said Domenico Lachich and Constantino Camalich [7] were not examined by the said Inspector Rafferty as to their right to land and/or enter the United States of America, and more particularly the port of Seattle, Washington, nor were they, or any of them, properly physically

examined by the medical examiners as required by the laws of the United States of America, and more particularly the Immigration Act of May 26, 1924, and that the said blanket detention order heretofore issued did not name the members of the crew of the said vessel sought to be detained thereon, nor did it name the said Domenico Lachich and Constantino Camalich, as required and contemplated by the rules and regulations of the Department of Immigration, United States of America, and/or the laws of the United States; nor were the said Domenico Lachich and Constantino Camalich given an opportunity to prove to the United States Immigration authorities that they, and each of them, were *bona fide* seamen, free from objectionable disease, and entitled to land in the United States under and by virtue of the provisions of the laws of the United States, and more particularly Section 3 of the Act of May 26, 1924; that although the said Domenico Lachich and Constantino Camalich had arrived at the port of Los Angeles, California, on board the motorship "Cellina" on or about the 5th day of March, 1927, on the voyage in question, and they and each of them had been duly and properly inspected and examined at the said port by the immigration officials of the United States of America there stationed, neither they, nor either of them, were ordered detained aboard the said vessel at the said port of Los Angeles, California; that thereafter the said vessel proceeded to the port of San Francisco, California, arriving thereat in due course on or about the 5th day of March, 1927, and that neither

the said Domenico Lachich, nor the said Constantino Camalich were ordered detained aboard the said vessel at the said port of San Francisco, California; that thereafter the said vessel proceeded to the port of Vancouver, British Columbia, returning [8] thereafter to the port of Seattle, Washington, and arrived thereat on the 17th day of March, 1927, as aforesaid, and then and there, for the first time, although they had previously been inspected and examined by the United States immigration authorities at the port of Los Angeles, California, twelve days previously, they were ordered detained aboard the said vessel without proper inspection or examination, and without being given an opportunity to prove that they were *bona fide* seamen as contemplated by the laws of the United States, and entitled to land at the said port of Seattle, Washington, and/or in the United States of America.

IX.

That subsequent to the escape of the said Domenico Lachich and Constantino Camalich from the said vessel, and upon its departure from the said port of Seattle, Washington, without their, or either of them being on board, the United States Immigration authorities and/or the Acting Collector of Customs of the United States of America, one of the defendants herein, served notice on the plaintiff herein and/or its agent of the intention of the United States of America to levy a fine in the sum of $2,500.00 for the failure to detain thereon the said Domenico Lachich and Constantino Cama-

lich; that thereafter, and in accordance with demand made, as aforesaid, plaintiff herein filed a proper bond in the sum of $2,500.00, conditioned that should an appeal be taken to the Department of Labor, Washington, D. C., and denied, and the fine finally levied, the sum of $2,000.00 would be paid; that thereafter an appeal was lodged with the United States Department of Labor but the fine heretofore levied was then and there imposed and plaintiff herein has paid to the defendants herein the sum of $2,000.00, said sum being paid under protest in order to obtain the clearance of the said vessel from the port of Seattle, Washington; [9] that upon the imposition of the said fine, and for the purpose of effecting collection of the same, the said defendants refused clearance papers to the said motorship "Cellina" on or about the 7th day of February, 1928, and thereupon, to effect the clearance of the said vessel, and to prevent inconvenience to passengers aboard the said vessel and a breach of its merchandise contracts for the carriage of goods, the plaintiff paid to the said Henry Blackwood, as Acting Collector of Customs at the port of Seattle, Washington, under duress and protest, the said fine in the sum of $2,000.00, so illegally imposed and collected, as aforesaid, and that although demand has been made upon the said defendant, Henry Blackwood, for the return of the said sum of $2,000.00, said defendant has wholly failed, refused, and neglected to return the same or any part thereof to the plaintiff, and

the whole of said sum is now due and owing to the plaintiff from the said defendants.

X.

That under and by virtue of the laws of the Kingdom of Italy, a corporation organized and existing under and by virtue of the laws of the respective states of the United States of America may sue the Kingdom of Italy under the circumstances presented here and/or if the said corporation or corporations so existing have a cause of action against the said Kingdom of Italy.

WHEREFORE, the plaintiff prays judgment against the defendants in the sum of $2,000.00, together with interest at the legal rate from the date of payment thereof, together with its costs and disbursements herein incurred, and for such other and further relief as it may be entitled to receive.

Dated: This 30th day of July, 1928.

NAVIGAZIONE LIBERA TRIESTINA.
By GENERAL STEAMSHIP CORPORATION, Agent.
By DREW CHIDESTER,
Its Vice-president.

IRA S. LILLICK,
BOGLE, BOGLE & GATES,
Attorneys for Plaintiff. [10]

State of California,
City and County of San Francisco,—ss.

Drew Chidester being first duly sworn, deposes and says:

That he is an officer, to wit, the vice-president of the General Steamship Corporation, agent of Navigazione Libera Triestina, a corporation, the plaintiff herein, and as such officer he is authorized to make this verification in its behalf; that he has read the foregoing complaint and knows the contents thereof, and that the same is true except as to such matters as are therein alleged to be upon information and belief, and as to such matters, he believes it to be true.

DREW CHIDESTER.

Subscribed and sworn to before me this 30th day of July, 1928.

[Seal] EDITH M. CLARK,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 3, 1928. [11]

[Title of Court and Cause.]

STIPULATION WITHDRAWING DEMURRER AND ALLOWING FILING OF AMENDED COMPLAINT.

WHEREAS, the plaintiff above named has heretofore filed its complaint in the above-entitled cause and the defendants have now filed a demurrer to said complaint, but have not answered herein,

IT IS HEREBY STIPULATED by and between the plaintiff, through its attorneys, Bogle, Bogle & Gates, and the defendants through their

attorneys, Anthony Savage, United States District Attorney and Tom DeWolfe, Assistant United States District Attorney, that the said demurrer heretofore filed be withdrawn and the plaintiff allowed to file its amended complaint herein with leave to defendants to file any further demurrer or pleading whatsoever to the said amended complaint of the plaintiff.

Dated this 5 day of January, 1929.

BOGLE, BOGLE & GATES,
Attorneys for Plaintiff.
ANTHONY SAVAGE,
TOM DeWOLFE,
Attorneys for Defendants.

[Endorsed]: Filed Jan. 5, 1929. [12]

[Endorsed]: Received a copy of the within amended complaint this 5 day of Jan., 1929.

ANTHONY SAVAGE,
Attorney for Deft.

AMENDED COMPLAINT.

Comes now the plaintiff above named, and for cause of action against the above-named defendant, alleges:

I.

That at all of the times hereinafter mentioned, Henry Blackwood was the duly appointed and qualified acting United States Collector of Customs at the port of Seattle, Washingon, and is a resident of the said city of Seattle, State of Washington, within the jurisdiction of this court.

II.

That at all times hereinafter mentioned, the defendant United States of America was, and now is, a sovereign state.

III.

That at all of the times hereinafter mentioned, the plaintiff, Navigazione Libera Triestina, was and now is an Italian corporation, organized and existing under and by virtue of the laws of the Kingdom of Italy, and is the owner and operator of various motorships plying between ports of the United States of America and ports of Italy, one of the said motorships being the motorship "Cellina," engaged in the business [13] of carrying mails, passengers and goods for hire between the aforesaid ports, and that at the time of the commission of the alleged illegal act hereinafter referred to, there were subsisting between the plaintiff and various individual shippers valid and binding contracts for the carriage for hire of various goods and commodities between the ports of the United States of America and the ports of foreign countries and return.

IV.

That at all of the times hereinafter mentioned, Giovanni Prigl was, and now is an Italian subject and the Master in charge of the motorship "Cellina," and the one on board the said motorship to whom the immigration instructions hereinafter set forth were given subsequent to the arrival of the

said vessel at the port of Seattle on or about the 17th day of March, 1927.

V.

That prior to the sailing of the said vessel from the port of Trieste, Italy, bound on a voyage therefrom to ports of the United States of America, and more particularly the port of Seattle, Washington, there were signed on board the said vessel, among others, as members of the crew thereof, and as *bona fide* seamen, Domenico Lachich and Constantino Camalich, citizens of the Kingdom of Italy and aliens to the United States of America; that the said Domenico Lachich and Constantino Camalich and all of the remaining members of the crew of the said motorship "Cellina" signed on board the said vessel on the said voyage, were not voluntarily chosen and/or hired as members of the crew thereof, but were assigned to and sent on board the said vessel by the captain of the port of Trieste, an official of the Kingdom of Italy, to fill vacancies in the crew of the said vessel, and [14] that neither the plaintiff herein, nor Giovanni Prigl, as Master of the said motorship "Cellina" had, nor exercised any choice in the selection of the said Domenico Lachich and/or the said Constantino Camalich as members of the crew of the said vessel on the said voyage.

VI.

That heretofore and on the 17th day of March, 1927, the said Italian motorship "Cellina" arrived

at the port of Seattle, Washington, from the port of Vancouver, British Columbia, a port foreign to the United States, with the said Domenico Lachich and Constantino Camalich then and there on board as members of the crew thereof. That prior to the arrival of the said vessel at the said port of Seattle, as aforesaid, the immigration authorities of the United States of America at the said port were duly and properly advised of the time and place of the arrival of the said vessel by its properly constituted agents, but in spite of such advices, properly and duly given, no representatives from the immigration service of the United States of America presented themselves, nor boarded the said vessel for the purpose of examining and/or inspecting the officers and members of the crew thereof upon its said arrival from Vancouver, British Columbia, as aforesaid, as required by the laws of the United States, and no representative from the said United States Immigration Service presented himself, nor boarded the said vessel until at or about the hour of 10:00 A. M. on the 18th day of March, 1927, at which time Inspector Rafferty of the United States Immigration Service at the said port of Seattle boarded the said vessel to inspect and examine the officers and members of the crew of the said vessel, in accordance with the provisions [15] of Section 20 of the Immigration Act of May 26, 1924; that the said members of the said crew of the said vessel, and all of them, including Domenico Lachich and Constantino Camalich, were then and there mustered on the deck of the said

vessel, willing and anxious to be examined and inspected; that upon such inspection of the crew as was given by the said Inspector Rafferty, which plaintiff alleges was not a proper inspection as hereinafter set forth, and as provided in Section 20 of the Immigration Act of May 26, 1924, a blanket notice to detain all of the members of the crew of the said vessel was then and there issued by the said Inspector Rafferty and served upon the Master of the said vessel, Giovanni Prigl; that at the time of the boarding of the said vessel by the said Inspector Rafferty, and at the time of the said inspection of said officers and crew of the said vessel, and at the time of the issuance of the said blanket detention order and service of the same upon the Master of the said vessel, Giovanni Prigl, all of the officers and members of the crew of the said vessel, including the said Domenico Lachich and Constantino Camalich and constituting its entire personnel, were then and there on board the said vessel within the confines of the port of Seattle, State of Washington; that the said Giovanni Prigl, as Master of the said vessel, upon being tendered the said blanket detention order, refused to accept the same and protested against the issuance of such an order detaining on board of said vessel all of the members of the crew of the said vessel; that the said blanket detention order was issued contrary to the rules and regulations of the Department of Immigration of the United States of America and/or of the laws of the United States of America applicable thereto; that thereupon the said Inspector

Rafferty refused [16] to issue any other supplementary or different order detaining any less than all of the members of the crew of the said vessel on board thereof, and then and there left and departed from the said vessel, ascertaining that proper and complete inspection and examination had been made of the crew thereof, and a proper detention order issued. Thereupon the members of the crew of the said vessel, including the said Domenico Lachich and Constantino Camalich, were set to work at their various duties aboard the said vessel, and the said Domenico Lachich and Constantino Camalich were then and there directed and ordered to commence the work of scraping and painting the outside forward part of the said motorship, which work they, and each of them, then and there commenced to perform; that the said blanket detention order then and there issued and so served upon the Master of the said vessel by the said Inspector Rafferty, as aforesaid, constituted and was a detention order issued subsequent to an alleged inspection and examination of the crew of the said vessel, and was intended by said United States Immigration Service and construed to be by the Master of the vessel as the final, conclusive, and only order detaining members of the crew of the said vessel thereof subsequent to its arrival from a foreign port, although its issuance was contrary to the rules and regulations of the United States Immigration Service and the laws of the United States applicable thereto, and contrary to Section 20 of the Immigration Act of May 26, 1924.

VII.

That thereafter, and during the stay of the said vessel at the port of Seattle, Washington, and in spite of every effort and care on the part of the captain, officers, and agents of the [17] said vessel, the said Domenico Lachich and Constantino Camalich escaped therefrom, and their whereabouts became, and remain to be, unknown to plaintiff herein and/or the owners, officers and agents of said vessel.

VIII.

That the members of the crew and seamen of the motorship "Cellina" were not given a fair, or any, hearing prior to the issuance of the said arbitrary blanket detention order detaining all of the members of the crew of the said vessel thereon; that the said members of the crew and seamen of the said vessel, and more particularly the said Domenico Lachich and Constantino Camalich were not examined by the said Inspector Rafferty as to their right to land and/or enter the United States of America, and more particularly the port of Seattle, Washington, nor were they, or any of them, properly physically examined by the medical examiners as required by the laws of the United States of America, and more particularly the Immigration Act of May 26, 1924, and that the said blanket detention order heretofore issued did not name the members of the crew of the said vessel sought to be detained thereon, nor did it name the said Domenico Lachich and Constantino Camalich, as required and contemplated by the rules and regula-

tions of the Department of Immigration, United States of America, and/or the laws of the United States; nor were the said Domenico Lachich and Constantino Camalich given an opportunity to prove to the United States Immigration authorities that they, and each of them, were *bona fide* seamen, free from objectionable disease, and entitled to land in the United States under and by virtue of the provisions of the laws of the United States, and more particularly Section 3 of the Act of May 26, 1924; that although [18] the said Domenico Lachich and Constantino Camalich had arrived at the port of Los Angeles, California, on board the motorship "Cellina" on or about the 5th day of March, 1927, on the voyage in question, and they and each of them had been duly and properly inspected and examined at the said port by the immigration officials of the United States of America there stationed, neither they, nor either of them, were ordered detained aboard the said vessel at the said port of Los Angeles, California; that thereafter the said vessel proceeded to the port of San Francisco, California, arriving thereat in due course on or about the 5th day of March, 1927, and that neither the said Domenico Lachich, nor the said Constantino Camalich were ordered detained aboard the said vessel at the said port of San Francisco, California; that thereafter the said vessel proceeded to the port of Vancouver, British Columbia, returning thereafter to the port of Seattle, Washington, and arrived thereat on the 17th day of March, 1927, as aforesaid, and then and there,

for the first time, although they had previously been inspected and examined by the United States immigration authorities at the port of Los Angeles, California, twelve days previously, they were ordered detained aboard the said vessel without proper inspection or examination, and without being given an opportunity to prove that they were *bona fide* seamen as contemplated by the laws of the United States, and entitled to land at the said port of Seattle, Washington, and/or in the United States of America.

IX.

That subsequent to the escape of the said Domenico Lachich and Constantino Camalich from the said vessel, and upon its departure from the said port of Seattle, Washington, without their [19] or either of them being on board, the United States Immigration authorities and/or the Acting Collector of Customs of the United States of America at the port of Seattle, Washingon, served notice on the plaintiff herein and/or its agent of the intention of the United States of America to levy a fine in the sum of $2,000.00 for the failure to detain thereon the said Domenico Lachich and Constantino Camalich. That thereafter and in accordance with demand made as aforesaid, plaintiff herein filed a proper bond in the sum of $2,500.00 conditioned that should an appeal be taken to the Department of Labor at Washington, D. C., and denied, and the fine finally levied, the sum of $2,000.00 would be paid. That thereafter an appeal was lodged with the United States Department of La-

bor, but the fine heretofore arbitrarily levied by the said Department of Labor was then and there imposed without justification and without authority under the Act of Congress of May 26, 1924, Chapter 190, Section 20 (A–C) 43 Statutes 164, and the plaintiff herein has paid to the defendant herein the sum of $2,000.00, said sum being paid under protest in order to obtain the clearance of the said vessel from the port of Seattle, Washington. That upon the imposition of the said fine and for the purpose of effecting collection of the same, the defendant and Henry Blackwood, Acting Collector of Customs at the port of Seattle, Washington, refused clearance papers to the said motorship "Cellina" on or about the 7th day of February, 1928, and thereupon to effect the clearance of the said vessel, and to prevent inconvenience to passengers aboard the said vessel, and in breach of its merchandise contracts for the carriage of goods, the plaintiff paid to Henry Blackwood as Acting Collector of Customs at the port of Seattle, Washington, under duress and [20] protest, the said fine in the sum of $2,000.00 arbitrarily and illegally imposed and collected as aforesaid, and that although demand has been made upon the United States of America, and the Department of Labor, and Henry Blackwood, Acting Collector of Customs at the port of Seattle, Washington, for the return of said sum of $2,000.00, said defendant has wholly failed, refused and neglected to return the same or any part thereof to the plaintiff and the whole of said

sum is now due and owing to the plaintiff from the said defendant.

X.

That under and by virtue of the laws of the Kingdom of Italy, a corporation organized and existing under and by virtue of the laws of the respective states of the United States of America may sue the Kingdom of Italy under the circumstances presented here and/or if the said corporation or corporations so existing have a cause of action against the said Kingdom of Italy.

WHEREFORE, the plaintiff prays judgment against the defendant in the sum of $2,000.00, together with interest at the legal rate from the date of payment thereof, together with its costs and disbursements herein incurred, and for such other and further relief as it may be entitled to receive.

Dated this —— day of January, 1929.

NAVIGAZIONE LIBERA TRIESTINA.
By GENERAL STEAMSHIP CORPORATION, Agent.
By R. K. BROWN, Jr.,
Local General Manager at Seattle, Wash.
BOGLE, BOGLE & GATES,
Attorneys for Plaintiff. [21]

State of Washington,
County of King,—ss.

R. K. Brown, Jr., being first duly sworn, on oath deposes and says:

That he is general manager of the General Steamship Corporation at Seattle, Washington,

agent of Navigazione Libera Triestina, a corporation, the plaintiff herein, and as such he is authorized to make this verification in its behalf for the reason that no officer is now present within the State of Washington; that he has read the foregoing amended complaint, knows the contents thereof and believes the same to be true.

R. K. BROWN, Jr.

Subscribed and sworn to before me this 5th day of January, 1929.

[Seal] EDWARD G. DOBRIN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Jan. 5, 1929. [22]

DEMURRER.

Comes now the United States of America, defendant in the above-entitled action by Anthony Savage, United States Attorney for the Western District of Washington, and Tom De Wolfe, Assistant United States Attorney for said District, and demurs to the amended complaint in the above-entitled matter on the grounds:

(1) That the Court has no jurisdiction of the subject matter of this action.

(2) That there is a defect of parties defendant.

(3) That several causes of action have been improperly united.

(4) That the amended complaint does not state facts sufficient to constitute a cause of action.

ANTHONY SAVAGE,
United States Attorney.
TOM DEWOLFE,
Asst. United States Attorney.

Received a copy of the within —— this —— day of ——, 19—.

_____,
Attorney for ——.

[Endorsed]: Filed Jan. 14, 1929. [23]

ORDER SUSTAINING DEFENDANT'S DEMURRER TO AMENDED COMPLAINT.

This matter coming on for hearing the 21st day of January, 1929, before the above-entitled court and the Honorable E. E. Cushman, Judge thereof, upon defendant's demurrer to plaintiff's amended complaint on file herein and argument having been presented by counsel on both sides for and against said demurrer.

It is hereby ORDERED that the said demurrer be overruled on the first ground stated sustained on the fourth ground of demurrer as contained in defendant's demurrer on file herein, to wit: on the ground and for the reason that the said amended complaint does not state facts sufficient to constitute a cause of action, to which order sustaining the demurrer the plaintiff excepts and plaintiff's said

exception is hereby allowed, and plaintiff is allowed seven days to amend.

The demurrer on the second and third grounds is ignored as consideration of such grounds is not necessary.

Done this 24th day of January, 1929.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed Jan. 24, 1929. [24]

DECREE OF DISMISSAL.

On this 25 day of April, 1929, it appearing to the Court that the above-named defendant heretofore filed a demurrer to plaintiff's amended complaint, which said demurrer came on for hearing on the 24th day of January, 1929, and was thereupon sustained as to the fourth ground of said demurrer, to wit: On the ground and for the reason that said amended complaint does not state facts sufficient to constitute a cause of action, and said demurrer was overruled as to the first ground, the second and third grounds not being considered by the Court, and plaintiff thereupon given seven days to amend, and an order having been so entered, to which order plaintiff duly excepted and its exception allowed, and WHEREAS, this cause now having come on for further hearing and the plaintiff now having elected to plead no further in this said cause but to stand upon its said amended complaint,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that plaintiff's amended complaint be dismissed and that defendant have and recover judgment against the plaintiff for its costs herein to be taxed in the sum of $——, to which decree plaintiff excepts, and exceptions hereby allowed. [25]

Done at Tacoma this 25 day of April, 1929.

EDWARD E. CUSHMAN,
District Judge.

The above order is hereby approved as to form.

BOGLE, BOGLE & GATES,
Attorneys for Plaintiff.
TOM DEWOLFE,
Asst. U. S. Atty.,
Attorneys for Defendant.

[Endorsed]: Filed Apr. 26, 1929. [26]

NOTICE OF APPEAL.

To the United States of America, Defendant, and to Anthony Savage and Tom DeWolfe, Its Attorneys:

NOTICE IS HEREBY GIVEN that the plaintiff, Navigazione Libera Triestina, a corporation, appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the above-entitled court, sustaining the demurrer of the defendant to plaintiff's amended complaint, which order was made on the 24th day of January, 1929,

and from the judgment of said Court dismissing the amended complaint of plaintiff, which said decree of dismissal was made on the 25 day of April, 1929, and from each and every part of said order and judgment.

NAVIGAZIONE LIBERA TRIESTINA, a Corporation.

By BOGLE, BOGLE & GATES,
Its Attorneys.

Service of the above notice of appeal after filing the same is hereby acknowledged this 26 day of April, 1929.

ANTHONY SAVAGE,
Attorneys for Defendant.

[Endorsed] Filed Apr. 26, 1929. [27]

PETITION ON APPEAL.

To the Honorable E. E. CUSHMAN, Judge of the United States District Court for the Western District of Washington, Northern Division:

Now comes the plaintiff, Navigazione Libera Triestina, a corporation, by its attorneys, and respectfully shows that on the 24th day of January, 1929, the above court sustained defendant's demurrer to plaintiff's amended complaint, and on the 25 day of April, 1929, final judgment was entered against plaintiff and in favor of the defendant dismissing the said amended complaint, to which said orders and judgment plaintiff duly excepted. Your

petitioner now feeling itself aggrieved by the said orders and judgment, herewith respectfully petitions this Court for an order allowing it to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit under the laws of the United States made and provided.

WHEREFORE, the premises being considered, your petitioner prays that an appeal in this behalf to said United States Circuit Court of Appeals for the correction of the errors complained of and herewith assigned be allowed, and that an order be made fixing the amount of security to be given by plaintiff, as appellant, conditioned as the law directs, and upon giving [28] such bonds as may be required, that all further proceedings may be suspended until the determination of said appeal by the said United States Circuit Court of Appeals.

NAVIGAZIONE LIBERA TRIESTINA, a Corporation, Plaintiff.

By BOGLE, BOGLE & GATES,
Its Attorneys.

Service of the above petition is hereby acknowledged this 26 day of April, 1929.

ANTHONY SAVAGE,
Attorneys for Defendant.

[Endorsed]: Filed April 26, 1929. [29]

ASSIGNMENTS OF ERROR.

Comes now the plaintiff and appellant in the above cause, and in connection with its petition for

appeal in said cause, assigns the following errors, which plaintiff and appellant avers occurred in the proceedings, orders and judgments of the above court in this said cause and upon which it relies to reverse the judgment entered therein as appears of record.

I.

The above District Court erred in sustaining defendant's demurrer for the reason that plaintiff's amended complaint does state facts sufficient to constitute a cause of action against the defendant and the ground for said demurrer is not well taken.

II.

The above District Court erred in dismissing plaintiff's action for the reason that said final judgment of dismissal is based upon the Court's erroneous ruling sustaining said demurrer of the defendant, and said judgment of dismissal is erroneous for the same reason.

WHEREFORE, plaintiff and appellant prays that the [30] judgment of said District Court be reversed.

NAVIGAZIONE LIBERA TRIESTINA, a Corporation, Plaintiff.

By BOGLE, BOGLE & GATES,
Its Attorneys.

[Endorsed]: Received a copy of the within assignments of error this 26 day of April, 1929.

ANTHONY SAVAGE,
Attorney for Defendant.

[Endorsed]: Filed Apr. 26, 1929. [31]

ORDER ALLOWING APPEAL.

Now on this 17 day of June, 1929, this cause came on to be heard upon the petition of Navigazione Libera Triestina, plaintiff and appellant, praying that an appeal be allowed to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors assigned and complained of, and it appearing to the Court that said appeal should be granted,

IT IS THEREFORE ORDERED that said appeal be and the same is hereby allowed upon the condition that a cost bond on appeal conditioned and approved according to law, and in the sum of $250.00 be furnished by plaintiff and appellant, and that a citation be issued and served as required by law.

Done in open court this 17 day of June, 1929.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: Filed Jun. 17, 1929. [32]

COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Navigazione Libera Triestina a foreign corporation, as principal, and American Surety Company of New York, a corporation duly authorized to transact a surety business in the State of Washington, as surety, are held and firmly bound unto

the United States of America, defendant in the above-entitled cause, in the full sum of two hundred and fifty dollars ($250.00), lawful money of the United States, to be paid to the said United States of America, for which payment well and truly to be paid, we bind ourselves and each of our successors and assigns, jointly and severally, firmly by these presents.

SIGNED, SEALED and DELIVERED this 17th day of June, 1929, at Seattle, Washington.

WHEREAS, Navigazione Libera Triestina, a foreign corporation, filed and served a notice of appeal in the above-entitled cause on the 26th day of April, 1929, which said appeal was allowed by the above court on the 17th day of June, 1929, and [33] have appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered in this said cause on the 25th day of April, 1929, wherein and whereby a demurrer interposed by defendant to plaintiff's amended complaint was sustained, on the ground that plaintiff's said amended complaint failed to state facts sufficient to constitute a cause of action, and wherein the said defendant, above named, was given judgment against the plaintiff for its costs to be taxed in this said case, to which decree plaintiff duly excepted and exception was allowed:

NOW, THEREFORE, the condition of this obligation is such that if the above-named Navigazione Libera Triestina, a corporation, appellants in the above-entitled cause and principals herein, shall

duly prosecute the appeal with effect, and pay all costs which may be awarded against them as such appellants if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, or on the mandate of said United States Circuit Court of Appeals for the Ninth Circuit by the above-entitled Court, then this obligation shall be void, otherwise the same shall continue in full force and effect.

NAVIGAZIONE LIBERA TRIESTINA,
A Foreign Corporation.
By GENERAL STEAMSHIP CORPORATION,
[Seal] R. K. BROWN, Jr.,
Its Duly Authorized Agent,
(Principal).

AMERICAN SURETY COMPANY OF NEW YORK.
By S. H. MELROSE,
Its President and Vice-president,
(Surety). [34]

Attest: E. F. KIDD,
Resident Assistant Secretary.

State of Washington,
County of King,—ss.

On this 17th day of June, 1929, before me personally appeared R. K. Brown, Jr., to me known to be the general manager of the corporation that executed the within and foregoing instrument as agent for the plaintiff, and acknowledged the said

instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument for and on behalf of said corporation.

IN WITNESS WHEROF, I have hereunto set my hand and affixed my official seal, the day and year first above written.

STANLEY B. LONG,
Notary Public in and for the State of Washington,
Residing at Seattle.

State of Washington,
County of King,—ss.

On this 17th day of June, 1929, before me personally appeared S. H. Melrose and E. F. Kidd, to me known to be the resident vice-president and resident assistant secretary of the American Surety Company of New York, the corporation that executed [35] the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year first above written.

[Seal] STANLEY B. LONG,
Notary Public in and for the State of Washington,
Residing at Seattle.

The foregoing bond and the sufficiency of surety thereon is on this 18 day of June, 1929, approved as a cost bond on appeal in this cause.

NETERER,
United States District Judge.

[Endorsed]: Filed Jun. 18, 1929. [36]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

We hereby request that you prepare, certify and file a transcript of the record on appeal to contain the following:

1. Complaint.
2. Stipulation.
3. Amended complaint.
4. Demurrer to amended complaint.
5. Order sustaining defendant's demurrer to amended complaint.
6. Decree of dismissal.
7. Notice of appeal.
8. Petition for order allowing appeal.
9. Order allowing appeal.
10. Cost bond on appeal.
11. Citation.
12. Assignments of error.
13. This praecipe.

In the preparation of said transcript of the record on appeal, you are requested to omit all captions except name [37] of the paper, and to omit acceptances of service, verifications and filing endorsement, except date thereof.

BOGLE, BOGLE & GATES,
Attorneys for Plaintiff.

STIPULATION RE PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

It is hereby stipulated and agreed by and between the attorneys for plaintiff and defendant herein that the foregoing praecipe contains all material matters, pleadings and records of the above-entitled action requisite for the prosecution of the appeal herein and that the attorneys for the defendant admit the sufficiency thereof.

BOGLE, BOGLE & GATES,
Attorneys for Plaintiff.
ANTHONY SAVAGE,
Attorneys for Defendant.

[Endorsed]: Filed June 17, 1929. [38]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 38, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel, filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant herein, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [39]

Clerk's fees (Act Feb. 11, 1925), for making record, certificate or return, 79 folios at 15¢ $11.85

Certificate of Clerk to Transcript of Record, with seal ..... .50

Total $12.35

I hereby certify that the above cost for preparing and certifying record, amounting to $12.35, has been paid to me by the attorney for appellant.

I further certify that I attach hereto and transmit herewith the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, in said District this 3d day of July, 1929.

[Seal] ED. M. LAKIN,

Clerk U. S. District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [40]

[Title of Court and Cause.]

CITATION ON APPEAL.

The United States of America to the United States of America, Defendant and Appellee, GREETING:

You are hereby cited and admonished to be and

appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, State of California, thirty (30) days from and after the day this citation bears date, pursuant to an appeal filed in the Clerk's office of the United States District Court for the Western District of Washington, Northern Division, wherein Navigazione Libera Triestina is appellant, to show cause, if any there be, why the order and judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS, the Honorable Edwin E. Cushman, Judge of the United States District Court, Western District of Washington, Northern Division, Seattle, Washington, this 17 day of June, 1929.

[Seal] EDWARD E. CUSHMAN,
Judge, United States District Court, Western District of Washington, Northern Division.

Service of the above citation acknowledged this 17 day of June, 1929.

ANTHONY SAVAGE,
Attorney for Defendant. [41]

[Endorsed]: No. 5875. United States Circuit Court of Appeals for the Ninth Circuit. Navigazione Libera Triestina, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United

States District Court for the Western District of Washington, Northern Division.

Filed July 6, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5875.

NAVIGAZIONE LIBERA TRIESTINA, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, a Sovereign State,

Appellee.

DESIGNATION OF RECORD ON APPEAL.

To the Clerk of the Above-entitled Court:

You are hereby requested to include in the transcript on appeal in the above-entitled matter, the following designated records which have been transmitted to you by the Clerk of the United States District Court for the Western District of Washington, Northern Division:

1. Amended complaint.
2. Assignment of error.

3. Certificate of the Clerk of the United States District Court.
4. Decree of dismissal.
5. Demurrer to amended complaint.
6. Order sustaining defendant's demurrer to amended complaint.
7. Order allowing appeal.
8. Stipulation re filing amended complaint.

You are hereby requested not to include in the record any other documents than those above indicated or as set out in the praecipe or transcript of record on file herein.

IRA LILLICK
LAWRENCE BOGLE,
CHALMERS G. GRAHAM,,
Proctors for Appellants.

[Endorsed]: Filed Jul. 13, 1929. Paul P. O'Brien, Clerk.

No. 5875

United States Circuit Court of Appeals

For the Ninth Circuit

NAVIGAZIONE LIBERA TRIESTINA, a corporation, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division

Brief of Appellant

LAWRENCE BOGLE
CASSIUS E. GATES
CLAUDE E. WAKEFIELD
Attorneys for Appellant
611 Central Building, Seattle, Washington

SUBJECT INDEX

TABLE OF CASES

No. 5875

United States
Circuit Court of Appeals
For the Ninth Circuit

NAVIGAZIONE LIBERA TRIESTINA, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division

Brief of Appellant

STATEMENT

This is an appeal from a decree of dismissal (Tr. 26) dismissing plaintiff's amended complaint (Tr. 13). The dismissal is based upon a demurrer inter-

posed by the defendant to plaintiff's amended complaint on four grounds (Tr. 24).

At the hearing before the lower court, the demurrer was overruled as to the first ground and sustained on the ground that the amended complaint failed to state facts sufficient to constitute a cause of action, the second and third grounds not being considered. (Tr. 25.) Plaintiff was allowed seven days to amend its amended complaint (Tr. 26) which plaintiff elected not to do, and subsequently an order of dismissal was entered based upon the said order sustaining defendant's demurrer on the fourth ground above stated from which order of dismissal plaintiff now appeals.

STATEMENT OF FACTS

This is a case brought by plaintiff to recover from defendant the sum of $2000.00 with interest, which said sum was paid by plaintiff to defendant under protest, as a fine imposed by the Department of Labor for an alleged violation by the plaintiff of Section 20(a) of the Immigration Act of May 26, 1924 (8 U. S. C. A. 167(a)) which said failure is alleged to consist of the failure of the master of the motorship "Cellina," a vessel owned and operated by the plaintiff to detain on board said vessel two alien seamen, to-wit: Domenico Lachich and Constantino Camalich,

until inspected by the immigration officer. A fine was assessed and paid under protest in the sum of $1,000 for each of said alien seamen under the provisions of the statute. (8 U. S. C. A. 167(a).) This action is brought in the United States District Court under Section 24, paragraph 20, of the Judicial Code (28 U. S. C. A. 41 (20)) as being one "founded upon * * * any law of Congress."

This case is before this court on the question of the sufficiency of the complaint to state facts constituting a cause of action.

ASSIGNMENTS OF ERROR
(Tr. 29)

Comes now the plaintiff and appellant in the above cause, and in connection with its petition for appeal in said cause, assigns the following errors, which plaintiff and appellant avers occurred in the proceedings, orders and judgments of the above court in this said cause and upon which it relies to reverse the judgment entered therein as appears of record.

I.

The above District Court erred in sustaining defendant's demurrer for the reason that plaintiff's

amended complaint does state facts sufficient to constitute a cause of action against the defendant and the ground for said demurrer is not well taken.

II.

The above District Court erred in dismissing plaintiff's action for the reason that said final judgment of dismissal is based upon the court's erroneous ruling sustaining said demurrer of the defendant, and said judgment of dismissal is erroneous for the same reason.

WHEREFORE, plaintiff and appellant prays that the judgment of said District Court be reversed.

ARGUMENT

1. *Plaintiff's amended complaint does state facts sufficient to constitute a cause of action against the defendant.*

The statute involved herein (8 U. S. C. A. 167-a) provides as follows:

"The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain

such seaman on board after such inspection or to deport such seaman if required by such immigration officer or the Secretary of Labor to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs."

The plaintiff in this action sues to recover back a fine which was arbitrarily and illegally imposed and collected by the defendant under the above statute. Paragraph 9 of plaintiff's amended complaint contains in part the following (Tr. 22):

"* * * The plaintiff herein has paid to the defendant herein the sum of $2,000, said sum being paid under protest in order to obtain the clearance of said vessel * * *. * * * Plaintiff paid to Henry Blackwood as Acting Collector of Customs at the Port of Seattle, Washington, under duress and protest, the said fine in the sum of $2,000 arbitrarily and illegally imposed and collected as aforesaid, and that although demand has been made upon the United States of America, and the Department of Labor and Henry Blackwood, Acting Collector of Customs at the Port of Seattle, Washington, for the return of said sum of $2,000, said defendant has wholly failed, refused and neglected to return the same or any part thereof to the plaintiff, and the whole of said sum is now due and owing to the plaintiff from the said defendant."

Such an action is provided for under the provisions of the Tucker Act (28 U. S. C. A. 41 (20)), and under the established cases.

Dooley vs. U. S. 182 U. S. 222.

Campagnie Generale Transatlantique vs. U. S., 21 Fed. 2nd 465, 26 Fed. 2nd 195.

Plaintiff alleges that the immigration authorities and Inspector Rafferty did not inspect and/or examine members of the crew of said motorship "Cellina" as required by Section 20 of the Immigration Act of May 26, 1924 (8 U. S. C. A. 167(a)) at the time that the blanket detention order detaining all members of the crew was issued, and that the said detention order was arbitrary and illegal and of no force and effect. Paragraph 8 of plaintiff's amended complaint contains the following material allegations (Tr. 19):

"That the members of the crew and seamen of the motorship "Cellina" were not given a fair or any hearing prior to the issuance of the said arbitrary blanket detention order detaining all of the members of the crew of the said vessel thereon; that the said members of the crew and the seamen of the said vessel and more particularly the said Domenico Lachich and Constantino Camalich were not examined by the said Inspector Rafferty as to their right to enter and/or land in the United States of America and more particularly the Port of Seattle, Washington, nor were they or any of them properly physically examined by the medical examiners as required by the laws of the United States of America, and more

particularly the Immigration Act of May 26, 1924, and that the said blanket detention order heretofore issued did not name the members of the crew of said vessel sought to be detained thereon, nor did it name the said Domenico Lachich and Constantino Camalich * * *; nor were the said Domenico Lachich and Constantino Camalich given an opportunity to prove to the United States immigration authorities that they and each of them were bona fide seamen, free from objectionable disease and entitled to land in the United States under and by virtue of the provisions of the laws of the United States and more particularly Section 3 of the Act of May 26, 1924. * * * They were ordered detained aboard said vessel without proper inspection or examination and without being given an opportunity to prove that they were bona fide seamen as contemplated by the laws of the United States. * * *

Plaintiff's complaint further alleges (Tr. 21 and 22) that thereafter the said two alien seamen escaped from the vessel and that the immigration authorities and/or Acting Collector of Customs at the Port of Seattle served notice of the imposition of a fine upon the master of the said vessel for failure to detain said alien seamen on board until inspected and demanded a bond which plaintiff posted in the sum of $2500.00. An appeal was lodged with the Department of Labor for a remission of the said fine which was denied and the fine arbitrarily levied against the plaintiff was imposed by the Department of Labor without justification and without authority and arbitrarily. This sum was paid by the plaintiff

under protest and in order to obtain the clearance of said vessel from the Port of Seattle.

Paragraph 9 of the plaintiff's amended complaint contains the following (Tr. 21 and 22):

"* * * That thereafter and in accordance with demand made as aforesaid, plaintiff herein filed a proper bond in the sum of $2500.00 conditioned that should an appeal be taken to the Department of Labor at Washington, D. C., and denied, and the fine finally levied, the sum of $2,000 would be paid. That thereafter an appeal was lodged with the United States Department of Labor, but the fine heretofore arbitrarily levied by the said Department of Labor was then and there imposed without justification and without authority under the Act of Congress of May 26, 1924, Chapter 190, Section 20 (a-c) 43 Statutes 164, and the plaintiff herein has paid to the defendant the sum of $2,000, said sum being paid under protest. * * *"

In the recent case of *Campagnie Generale Transatlantique vs. U. S.*, 21 Fed. 2nd 465, decided by the the United States District Court for the Southern District of New York, and affirmed in 26 Fed. 2nd 195 by the Circuit Court of Appeals for the Second Circuit, the plaintiff sought to recover sums imposed as fines by the Commissioner of Immigration and paid under protest. The facts and law involved in this case are similar to the case before this court.

The second and third causes of action in the above case alleged the fines to have been imposed under

Section 16 A and B of the Immigration Act of May 26, 1924, 8 U. S. C. A. 216. The plaintiff further alleged that no statute of the U. S. had been violated and that the act of the Secretary of Labor in imposing the fine was without lawful authority and arbitrary, and that the defendant received the said money to the use of the plaintiff. The lower court overruled defendant's motion to dismiss and found for the plaintiff.

Before the Circuit Court of Appeals (26 Fed. 2nd 195), the plaintiff in error contended that the claims were not founded upon a law of Congress and the action, therefore, could not be maintained under the Tucker Act (28 U. S. C. A. 41 (20)). The court said:

"The judgment below was granted because the fines were improperly or arbitrarily retained, when under Section 16 (c) of the Act of 1924 the Secretary of Labor should have refunded the sums paid * * *. Therefore, the right of recovery is based upon a law of Congress."

On the question of the duty of the Secretary of Labor to refund penalties improperly imposed, the court said:

"*It was the duty of the Secretary of Labor to refund the penalties if they were improperly imposed.* That they were wrongly imposed is established * * *. Arbitrary action in acting or refusing to act would not defeat the defendant in error's claim to a refund.

Keeping the fine without conforming to Section 16, that is, without fairly passing on the issue presented to him, would be arbitrary, and such action by the Secretary is pleaded and for the purpose of the motion to dismiss is admitted.

"The defendant in error assented to the deposit or payment, but under protest and its receipt by the Collector was in no way tortious."

In regard to the plaintiff's right of recovery in this case, the court distinguishes it from the case of *U. S. vs. Holland American Lijn* (254 U. S. 148) where "immigration officials were acting wholly without law to authorize their acts." The Circuit Court said in speaking of the case before them (26 Fed. 2nd 195):

"But here the right of recovery is based upon the obligations imposed under Section 16, upon the Secretary of Labor, and the defendant in error seeks to recover because of the arbitrary action in his failure to act upon the evidence which justified his refunding the fines."

See, also:

Dooley vs. U. S., 182, U. S. 222.

Gilmour vs. Newton, 270 Fed. 332.

Our present case involves a decision by the Secretary of Labor imposing a fine upon the plaintiff based upon the provisions of a statute of the U. S. (8 U. S. C. A. 167 (a)). The plaintiff alleges this said statute was not violated by reason of the improper inspec-

tion and examination, and the blanket detention order detaining all of the members of the crew based upon the said improper inspection and examination. The question involved is a question of law as to the construction of a statute, to-wit: 8 U. S. C. A. 167(a). This question of law was arbitrarily decided by the Secretary of Labor resulting in the refusal to refund the fines and this action by the Secretary of Labor is, therefore, reviewable by the courts.

In the case of *U. S. vs. Laughlin*, 249 U. S. 440, the court held that the intent of Congress was that the Secretary should have exclusive jurisdiction only to determine disputed questions of fact and that as in other administrative matters his decision upon questions of law was reviewable by the courts.

In the case of *Medbury vs. U. S.*, 173 U. S. 492, the court held that the court of claims had jurisdiction of an action to recover excess payments for lands within the limitation of a railroad grant. The court said:

"We cannot suppose that Congress intended in such cases to make the decision of the Secretary final when it was made on undisputed facts. If not, then there is a remedy in the court of claims for none is given in the act which creates the right * * *. If there were any disputed questions of fact before the Secretary, his decision in regard to those matters would probably be conclusive and would not be reviewed in any court, but where as in this case there is no dis-

puted question of fact, and the decision turns exclusively upon the proper construction of the Act of Congress, the decision of the Secretary refusing to make the payment is not final, and the court of claims has jurisdiction of such a case."

That the blanket detention order was unlawful and contrary to the provisions of 8 U. S. C. A. 167(a), due to the lack of a fair inspection and examination as provided by the said statute, has been indicated in the case of *U. S. vs. Day* decided by the Circuit Court of Appeals for the 2nd Circuit, 20 Fed. 2nd 302. This case involved the construction of a statute of the United States involving immigration, and the question of the right of the Commissioner of Immigration to detain an alien seaman on board the vessel. The contention was that the inspector had not accorded a fair hearing as required by the statute. The court said:

"We think that the inspector must accord the seaman a fair hearing and give him the chance to show that he is landing as the statute requires. The record shows that in the case at bar the inspector did not do this. Relying upon the suspicious evidence of the manifest, his questions to the master and the letter to the department, he merely passed the suspected seamen before him in line and thereupon ordered their detention. Thus he deprived them of any opportunity to disabuse him of his suspicion and to prove their intention. *The detention was, therefore, unlawful* and the writ should have been allowed."

The very recent case of *McCarl vs. U. S.*, decided January 7, 1929, by the Court of Appeals of the Dis-

trict of Columbia and cited in 30 Fed. 2nd 561, indicates the construction given to 8 U. S. C. A. 167(a) by the Department of Labor and by the courts.

This case involved a writ of mandamus for the payment of a certain voucher issued by the Department of Labor as a refund on an immigration fine imposed under 8 U. S. C. A. 167(a). The facts reported in the opinion of the case, however, are pertinent here as showing the attitude of the Department of Labor itself in regard to fines imposed under this said section and the issuance of blanket detention orders.

The facts appear as follows: The S. S. "Marte" arrived at the port of New Orleans with a crew of seven officers, a steward and 23 bona fide seamen. Upon arrival, the master of the vessel was served by the U. S. immigration officer at the port with a written notice to detain on board all members of the crew except the officers and steward. The master diligently endeavored to comply with this order but notwithstanding his efforts, seven members of the crew made their way to the port and did not return. A report of this fact was duly made to the immigration officer but the vessel was granted clearance from the port of New Orleans without assessment of any penalty because of the escape of the seamen. The

vessel proceeded on her homeward voyage and called at the port of Norfolk, Va., at which port the master of the vessel was required to pay the sum of $7,000 as a fine for his failure to detain the seven deserting seamen at New Orleans. In order to obtain clearance of the vessel, this sum was deposited under protest whereupon the vessel was allowed to depart. This sum was afterwards paid into the U. S. Treasury as an immigration fine. Later an investigation was made by the Commissioner General of Immigration and the Secretary of Labor and it conclusively appeared to them that the fine was collected through error of the government officers. Whereupon they authorized and directed that it be refunded, and a voucher was accordingly issued by the Department of Labor for the sum of $7,000 as a repayment of the fine.

From the language of the opinion it appears that these above facts were contained in the complaint to which complaint the defendant answered, and plaintiffs demurred to the answer. Plaintiffs' demurrer was sustained. This case, and the one before this court, present similar facts and show inconsistent action by the Secretary of Labor in the construction of the same statute. (8 U. S. C. A. 167(a).)

In the case of *U. S. vs. National Surety Company,* 20 Fed. 2nd 972, Section 20 of the Immigration Act

of May 16, 1924, (8 U. S. C. A. 167) was involved. In this case the U. S. sought to recover fines levied against a steamship company for failure to detain on board certain alien seamen who had been ordered detained by the immigration officers. The language of the court in speaking of the Immigration Act is pertinent to this case. The court said:

"To my mind it is perfectly clear that the immigration officer, or the Secretary of Labor, shall determine the bona fides of the seaman, and if they determine any man or men to be non bona fide seamen, this is final, *if the examination was fair and proper*, and he must be detained on board or deported as ordered."

CONCLUSION

It is, therefore, the contention of the appellant in this case that the amended complaint alleges that the blanket detention order issued by the immigration officer pursuant to 8 U. S. C. A. 167(a), was unlawful and of no force and effect, due to the failure of the immigration officer to accord the alien seamen a fair and proper examination and inspection as provided by the said statute. That, therefore, the statute was not violated by the plaintiff, and the action of the Secretary of Labor in imposing the fines was an arbitrary and unlawful action involving a question of law as to the proper construction of 8 U. S. C. A. 167(a), and that this action by the Secretary

of Labor is, therefore, reviewable by the courts. Appellant earnestly contends, therefore, that the amended complaint does state facts sufficient to constitute a cause of action and that the lower court erred in sustaining defendant's demurrer on the ground that the said amended complaint did not state facts sufficient to constitute a cause of action, and, therefore, that the decree of dismissal subsequently entered by the lower court based upon the said erroneous order sustaining defendant's demurrer was not justified and was not according to law.

WHEREFORE, appellant prays that the decree of dismissal and the order sustaining the demurrer entered by the trial court be set aside and that the cause be remanded to the District Court for the Western District of Washington, Northern Division, with instructions to overrule the said demurrer which the lower court heretofore sustained.

Respectfully submitted,

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In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5875

NAVIGAZIONE LIBERA TRIESTINA,
a Corporation, *Appellant,*

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD E. CUSHMAN, *Judge*

BRIEF OF APPELLEE

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HONORABLE EDWARD E. CUSHMAN, *Judge*

BRIEF OF APPELLEE

STATEMENT

The amended complaint set out in the transcript (Tr. 13) sets out the fact that the plaintiff is an Italian Steamship Company and operates the "Cellina"; that Giovanni Prigl is the master of the vessel, and

that two citizens of Italy were bona fide seamen on said vessel. Paragraph VI of the amended complaint (Tr. 15) alleges that these two seamen were on board when the vessel left Vancouver, British Columbia, and from there came on the vessel to Seattle; that no one from the Immigration Department inspected the crew until the 18th day of March, at ten o'clock A. M., when Inspector Rafferty came on board and made a brief inspection and issued a blanket order of detention. The complaint alleges further that this blanket order of detention was improper, and that the Master refused to accept service of the same, and that Rafferty left the vessel immediately after issuing the blanket order.

Paragraph VII alleges that despite the care of the plaintiff, two seamen escaped after the blanket order was issued, and further alleges that the plaintiff does not now know the whereabouts of the two seamen. Paragraph VIII of the complaint attacks the blanket order and alleges that said order was "arbitrary" and further that they (the two seamen) did not have an opportunity of proving to the Inspector that they had a right to go to port, further alleging that that right to leave the vessel had been given to them in the Port of Los Angeles and in the Port of

San Francisco by the Immigration Inspectors there.

Paragraph IX of the complaint sets out that the subsequent fine of Two Thousand ($2,000) Dollars for allowing the seamen to escape, which was imposed upon the vessel itself, was "unlawful" and "arbitrary" and "without authority" and prays for a return of the Two Thousand Dollars.

The Government demurred to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action and Judge Cushman sustained the demurrer.

ISSUE

The sole question before this Court is whether a general allegation in a complaint to the effect that the action of the Inspector was arbitrary and illegal and that the fine imposed by the Collector of Customs was "arbitrary" and "illegal" and "without authority" and "without justification," constitutes sufficient facts to make the complaint demurrer proof.

ARGUMENT

The complaint does *not* state facts sufficient to constitute a cause of action. The Statute referred to in the complaint 43 Stat. 164; 8 U. S. C. A. Sec. 167, upon which this fine was levied, is as follows:

> "(a) Detention of seamen on board vessel until after inspection; detention or deportation; penalty; clearance to vessels. The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seamen on board after such inspection or to deport such seamen if required by such immigration officer or the Secretary of Labor to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

> (b) Prima facie evidence of failure to detain or deport. Proof that an alien seaman did not appear upon the outgoing manifest of the vessel on which he arrived in the United States from any place outside thereof, or that he was reported by the master of such vessel as a deserter, shall be prima facie evidence of a failure to detain or deport after requirement by the immigration officer or by the Secretary of Labor."

The position of the appellant is hard to determine, first alleging in Paragraph VIII of its complaint (Tr. 19) that the inspection of the Inspector Rafferty did not constitute an inspection, and then seeking, by the fact that this inspection was not proper, to justify the escape of two aliens. Assuming that the position of the appellant is correct, that this was not a proper inspection, then it must remain clear that according to Section 167 (a) above set out of the Immigration Act, it was the duty of the master to detain the seamen until a proper examination was given. The complaint admits that the seamen escaped and clearly establishes by its own pleading the liability under the Act.

Let us examine the amended complaint. The appellant admits in Paragraph VI (Tr. 17) that Inspector Rafferty's inspection was not proper, and further that the master of the vessel refused to accept the

blanket order of detention. He clearly then did not regard the inspection as a proper one, and if the inspection was not a proper one, the master had no right to let the seamen go, the statute placing upon them an absolute liability in case such seamen do escape or leave the vessel before a proper inspection. It is argued in the brief that the master had no other remedy, there was nothing else that the could do, and that they escaped from no cause of his own. It must be obvious to this Court in answer to this contention that the master could have insisted upon a proper inspection if the first inspection was wrong or unlawful, as the appellant states it to be. This, he did not do and was, of course, correctly penalized. It cannot be argued in one breath that the inspection was unlawful and, therefore, not recognized, and then in another breath urge that the seamen were detained until the inspection and that they have subsequently escaped.

It is further urged in the brief of the appellant that the two seamen had a right to enter the United States. They set out the fact that they were allowed entrance through the Port of Los Angeles and the Port of San Francisco, and that it was illegal and arbitrary to refuse them this right in Seattle. In this respect we call the Court's attention to the case of The

Limon, District Court, 14 F. (2) 145, Circuit Court decision in 22 F. (2) 270. This case was an action to collect penalties for violation of Sec. 33 of the Immigration Act of 1917, an act similar to the one in which the penalties in the instant case were instituted. That Act, Sec. 33, made it unlawful for a master of a vessel arriving in the United States from any foreign port to pay off or discharge any alien seamen unless duly admitted under the Immigration laws. The master of the vessel "The Limon" paid off two seamen after having received a blanket detention order to detain such alien seamen on board the vessel, which order like the present one did not specially name the seamen. The Circuit Court says on page 272 of its decision:

> "It is conceded by the appellant that it did not comply with the regulations or give any notice to the Secretary of Labor. Nor does the right of a seaman to shore leave excuse the appellant from its breach of section 33." * * *
>
> "A suggestion that no notice was given to detain the particular seamen is of no force, because section 33 does not require a notice, as does section 32. A notice to detain aliens is a direction to prevent them from entering the country."

The appellant has pleaded mere conclusions of law and

> " a demurrer on the ground of insufficient facts to constitute a cause of action or defense, will lie to such a pleading."

31 Cyc. 280; See cases cited in Note 6, 31 Cyc. 281.

There are a number of Federal cases which announce the rule that pleading that the action of an individual was "arbitrary," "unjust" and "unlawful" are mere conclusions of law. There is the Silberschein case vs. the United States, 266 U. S. 221, which case involves the action of a director of the Veterans' Bureau in determining compensation under the War Risk Insurance Act. On page 225, the Supreme Court of the United States stated in the Silberschein case:

> "The general allegations of the petition that the Director's decision was arbitrary, unjust and unlawful, and a usurpation of power, are merely legal conclusions. Clearly, the petition does not present a case where the facts are undisputed and the only conclusion properly to be drawn is one favorable to petitioner, or where the law was misconstrued, or where the action of the executive officer was arbitrary or capricious."

In *United States vs, Meadows*, 32 F. (2) 440, the Federal District Court was held to have no jurisdiction in a suit against the United States to reinstate a veter-

an's lapsed insurance policy. The Court held on page 441, and quotes the decision in the case of *Silberschein vs. United States*, 266 U. S. 221:

> "It has been repeatedly determined that the grant of power given to the Director by section 2 of the act of 1921, to decide questions of fact, cannot be challenged, unless the controversy falls within section 19 of the act of 1924, as amended by act of 1925 (38 USCA Sec. 445), or unless such decision is 'wholly without evidential support or wholly dependent upon a question of law or clearly arbitrary or capricious.' *United States v. Williams*, 49 S. Ct. 97, 73 L. Ed.—decided January 2, 1929; *Silberschein v. United States*, 266 U. S. 221, 225, 45 S. Ct. 69 (69 L. Ed. 256); *Armstrong v. United States*, 16 F. (2) 387, 389, this court; *United States v. Edwards*, 23 F. (2d) 477, 479, this court. There is no allegation in this petition that the action of the Director upon this matter was wholly unsupported by evidence or wholly dependent upon a question of law or clearly arbitrary and capricious. The only allegation is that the Director acted 'erroneously and contrary to the terms of the War Risk Insurance Act and amendments thereto.' In *Silberschein v. United States*, 266 U. S. 221, 225, 45 S. Ct. 69, 71 (69 L. Ed. 256), the Supreme Court stated that:
>
> " 'The general allegations of the petition that the Director's decision was arbitrary, unjust and unlawful, and a usurpation of power, are merely legal conclusions. Clearly, the petition does not present a case where the facts are undisputed and the only conclusion properly to be drawn is one favorable to petitioner, or where the law was mis-

construed, or where the action of the executive officer was arbitrary or capricious.'

"Obviously, the allegations in the present petition fall far short of charging any such action upon the part of the Director as would give this court jurisdiction. Therefore, the court was without jurisdiction unless such is given by section 19 of the act of 1924."

The complaint of the appellant likewise alleges mere conclusions of law. Paragraph IX of the amended complaint (Tr. 22):

"The said fine in the sum of Two Thousand Dollars was 'arbitrarily' and 'illegally' imposed."

Paragraph VIII:

"The said 'arbitrary' blanket detention order."

We do not quarrel with the cases of the appellant cited in its brief, which show that the plaintiff has the right to sue the Government for the return of fines imposed, but said complaint should not be based upon legal conclusions, but must plead facts. Counsel cites the case of *McCarl vs. United States*, 30 F. (2) 561, and argues that this case is in point. The circumstances of the McCarl case clearly show that there was an error of law made by the Collector and that after said

error was made and the fine of Seven Thousand Dollars imposed, the Collector realized his mistake and conceded that the money should be refunded to the Steamship Company. The Commissioner General of Immigration and the Secretary of Labor realized, as may be gathered from the reading of page 562 of the opinion, that the fine was collected through error of Government officers. Whereupon, they authorized and directed that it be refunded, but the question decided in the case was a question of mandamus and does not go into the merits of the Immigration Act. In the instant case no admission of error in assessment is made.

It must seem clear to this Court, as it did to the lower Court when sustaining the demurrer to the amended complaint, that,

First, the appellant has no right to justify the escape of alien seamen on the grounds that an order is arbitrary and illegal. The liability rests on them to retain said seamen even without a detention order until a proper examination is made. The fact that the master of the vessel admits in the pleadings that he refused to accept the detention order shows that he himself did not regard this as a proper examination.

Second, the complaint sets out conclusions of law and does not state facts sufficient to constitute a cause of action.

It is respectfully submitted, that the ruling of the lower court be affirmed.

Respectfuly submitted,
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JEFFREY HEIMAN,
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